86-981

No.

Supreme Court, U.S.
FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a
NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,
PETITIONER

v.

CITY OF RALEIGH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an ordinance that requires petitioner to tear down billboards that cost hundreds of thousands of dollars to erect and to abandon valuable interests in land that are useful only for the purpose of maintaining signs, and that provides as "compensation" nothing more than a 5½ year delay in the effective date of the removal obligation, constitutes a taking of property without just compensation or a denial of due process, in violation of the Fifth and Fourteenth Amendments.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

The caption lists the names of all parties to this proceeding. Morris Communications Corporation is petitioner's parent company. Petitioner has no subsidiaries (except wholly owned subsidiaries) or affiliates.

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v.

CITY OF RALEIGH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Major Media of the Southeast, Inc., d/b/a Naegele Outdoor Advertising Company of Raleigh-Durham, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 792 F.2d 1269. The opinion of the district court (App., *infra*, 11a-26a) is reported at 621 F. Supp. 1446.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1986, and a petition for rehearing was denied on July 17, 1986 (App., *infra*, 27a). On September 15, 1986, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including December 14, 1986 (App., *infra*, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> [No person shall] be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The billboard ordinance at issue in this case, Raleigh City Code §§ 10-2065, 2066, is reprinted in pertinent part at App., *infra*, 29a-32a.

STATEMENT

A. Background of the Raleigh Billboard Ordinance.

1. Petitioner Major Media of the Southeast, Inc., d/b/a Naegele Outdoor Advertising Company ("Naegele"), has been lawfully engaged in the outdoor advertising business in Raleigh, North Carolina for many years. Its billboards are located on property in commercial and industrial areas that is either leased to or, in a few instances, owned by Naegele for the purpose of maintaining outdoor advertising displays. Each such billboard was erected in full compliance with all applicable laws of the State of North Carolina and the City of Raleigh. C.A. App. 59.

In October 1983, when the ordinance at issue in this case was enacted, Naegele owned approximately 350 of the 485 billboard faces within Raleigh's zoning jurisdiction. C.A. App. 33. Although these structures were of several different types, sizes and heights, depending on the structure's age, location, and surroundings, the great majority were either 300 square foot "posters" or 672 square foot painted "bulletins". These dimensions are nationwide industry standard sizes suitable for display of preprinted designs received from national, regional and local advertisers. *Id.* at 34.

The cost of constructing Naegele's billboards, as well as the fair market value of each, differed substantially de-

pending upon composition and manner of construction. Some older creosote pole signs, which Naegele no longer constructs, cost only $2,000-$3,000 to erect. The initial investment in more modern steel structures, however, was in the $25,000-$35,000 range. C.A. App. 34-35. Most of these structures had an income-producing life well in excess of 20 years when the ordinance challenged here went into effect. *Id.* at 11. At the time the ordinance was adopted in 1983, the value of Naegele's investment in the signs doomed by the ordinance was approximately $3 million.[1]

Naegele's advertising signs are utilized to communicate views to the public with respect to a wide variety of matters of importance to business, civic, social, charitable, religious and educational organizations. In many instances, no equally satisfactory or effective alternative channels of communication are available to persons or entities desiring to use outdoor advertising as a means of presenting their message to large numbers of the public. In addition to advertising goods and services, for example, Naegele's displays in Raleigh have been used to publicize awareness campaigns of the Raleigh Chamber of Commerce and Better Business Bureau, to communicate messages from candidates for political office, to seek support for the return of the Iranian hostages, to promote adequate highway funding, to solicit contributions for crippled or disabled children, to denounce drug abuse, and to promote the United Way and a host of other charitable and social organizations. C.A. App. 32.

2. The City of Raleigh enacted its first comprehensive sign regulations on January 2, 1979. Ordinance No.

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[1] The replacement cost of the physical structure, while substantial, represents only a fraction of its value. Traditionally, market value in the billboard industry is calculated as a multiple (about three or four times) of annual revenues from each sign. Naegele's annual revenues in 1983 from the signs it will be required to remove under the Raleigh ordinance totaled nearly $1 million.

(1979) 982 TC 96 ("the 1979 Ordinance"). C.A. App. 369-404. These regulations were approved after substantial public discussion and consultation with numerous local groups and businesses, including Naegele. The 1979 Ordinance classified signs into "on-premise" and "off-premise" categories, based generally on whether they directed attention to an activity conducted on the premises where the signs were located. App., *infra*, 2a.

The 1979 Ordinance specified the areas of the city in which on-premise and off-premise signs would be allowed. In addition, most on-premise signs were limited to a maximum of 150 square feet, while off-premise signs were limited to a maximum of 675 square feet. Significantly, however, any billboards made nonconforming by the 1979 Ordinance were "grandfathered," *i.e.*, permitted to remain in use as long as they were not moved or materially altered in structure. C.A. App. 386. The city considered, but rejected, a proposal that would have required the removal of nonconforming signs after a so-called "amortization period." Upchurch Aff. 14.

Following adoption of the 1979 Ordinance, and in reliance on its provisions, Naegele invested substantial amounts for capital expenditures on its business activity within Raleigh. C.A. App. 65. Specifically, Naegele replaced and upgraded existing sign structures, acquired new locations, and constructed new billboards. In each instance, Naegele complied with the procedures and requirements of the 1979 Ordinance and obtained a permit from the city. *Id.* at 59.

3. In October 1983, Raleigh substantially revised its sign regulations in a manner that all but eliminates off-premise advertising structures as a medium of expression in the city. The new ordinance, Ordinance No. (1983) 210 TC 198, Raleigh City Code §§ 10-2065, 2066 ("the 1983 Ordinance"), prohibits off-premise signs in all areas of the city except those zoned Industrial 1 or Industrial 2; within those zones, the 1983 Ordinance restricts off-

premise signs to locations that are more than 400 feet in any direction from a residential zone, and limits the size of off-premise signs from the previous maximum of 675 square feet to 150 square feet alongside four-lane roads and 75 square feet alongside two-lane roads. App., *infra*, 2a. The 1983 Ordinance also increases the required spacing between off-premise signs from 200 to 1,000 linear feet. *Id.* at 31a-32a.

Unlike the 1979 Ordinance, which permitted nonconforming signs to remain in existence, the 1983 Ordinance requires the removal of *all* nonconforming off-premise signs within 5½ years from October 23, 1983, unless such removal is expressly prohibited by state statute. App., *infra*, 32a.[2] The 5½-year "amortization period" was

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[2] North Carolina General Statutes § 136-131.1 currently prohibits the required removal, without compensation, of outdoor advertising signs erected pursuant to a valid Department of Transportation permit adjacent to highways on the National System of Interstate and Defense Highways or on the Federal-aid Primary Highway System. The law is scheduled to expire in 1989. Of Naegele's 350 signs, 170 are adjacent to federally-aided highways. App., *infra*, 3a.

On-premise signs are subject to a different set of regulations. The 1983 Ordinance grandfathers existing nonconforming on-premise signs advertising commercial activity, but places size and other limitations on any new or altered on-premise signs. The message content of an on-premise sign is restricted to copy that "directs attention to the business, profession, commodity, attraction, service or entertainment conducted, offered, sold, manufactured, existing or provided at a location on the premises where the sign is located or to which it is affixed." App., *infra*, 29a.

Subsequent to commencement of this litigation, the city recognized that the 1983 Ordinance omitted certain essential protections for on-premise signs containing non-commercial messages, rendering it vulnerable under this Court's decision in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981). It therefore adopted an amendment (Raleigh City Code § 10.2065.4) that permitted "any sign authorized under this chapter [to] contain non-commercial copy in lieu of any other copy." App., *infra*, 30a. Although the opinion of the court of appeals reflects some confusion on this

selected without any attempt to determine whether that length of time was reasonable in light of the actual value and useful life of the billboards that must be taken down or the investment expectations of the sign owners. Moreover, the ordinance provides no compensation of any kind for the forced destruction of these valuable income-producing properties.

As the court of appeals acknowledged (App., *infra*, 3a), the impact of the 1983 Ordinance on Naegele's outdoor advertising business is devastating. In April 1989, when the "amortization period" expires, Naegele will be required to tear down and remove 174 existing billboards made nonconforming by the Raleigh ordinance, out of a total of 180 billboards not adjacent to a federal-aid highway. *Ibid.* Although these signs have replacement costs of between $2,500 and $35,000 apiece and have fair market values well in excess of that (C.A. App. 34-35), and although the signs will retain a substantial useful life at the conclusion of the "amortization period" (*id.* at 11), they will have to be dismantled at Naegele's expense, after which they will be worth only a minimal salvage value. *Id.* at 354. In addition, Naegele's leasehold rights will be worthless, because the leases usually limit Naegele's use of the land to erection of signs and because many of the parcels on which billboards are situated have no other economically beneficial purposes. *Id.* at 508.[3]

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point (see *id.* at 5a & n.3), it seems reasonably clear that the 1983 Ordinance does not wholly deregulate non-commercial signs, but simply (as it says) allows them wherever commercial messages are permitted. Thus, insofar as Naegele's off-premise advertising business is concerned, it may not erect or maintain billboards containing non-commercial messages except where it could also display commercial messages.

[3] The parties stipulated that "Naegele cannot now relocate, replace, renew or improve any of its present billboards or erect new billboards except in compliance with the provisions of § 10-2066 of the Raleigh City Code or unless it is successful in obtaining a

B. The Litigation.

1. In July 1984, Naegele brought this action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina, contending that the 1983 Ordinance violated its rights under the First, Fifth, and Fourteenth Amendments to the Constitution, as well as various provisions of North Carolina law. Following discovery, Naegele moved for summary judgment on its First Amendment claims; the company did not contend that its Fifth Amendment claims could be resolved summarily. App., *infra*, 13a. Raleigh cross-moved for summary judgment on all issues. *Id.* at 18a.

Naegele's summary judgment motion asserted several First Amendment defects, including that the 1983 Ordinance was impermissibly vague, that the ordinance granted undue discretion to city officials to classify speech as commercial or non-commercial, and that, even as amended (see note 2, *supra*), the ordinance favored commercial speech over non-commercial speech in violation of *Metromedia* v. *City of San Diego*, 453 U.S. 490 (1981). Naegele charged that the city's purported goals in enacting the ordinance—to promote traffic safety and to improve community aesthetics—were insubstantial and without record support. At a minimum, Naegele argued, a trial was required under *Metromedia* and *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), to determine whether the city's concerns were substantial enough to justify the restrictions on speech and whether the ordinance was sufficiently tailored not to limit speech more than necessary to accomplish the city's goals. App., *infra*, 19a.

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variance by appeal to the Raleigh Board of Adjustment." They also stipulated, however, that if Naegele were to seek a variance, "no permit would be granted for any billboard that does not conform to the size, spacing, and location restrictions as set forth in the Raleigh City Code." C.A. App. 43. As a result, it can now be finally determined what the impact of the 1983 Ordinance is on Naegele's property interests.

Naegele's complaint also contended that the 1983 Ordinance violated the Takings Clause of the Fifth Amendment because it forced the removal of valuable private property for a public purpose without the payment of any compensation. In this regard, Naegele alleged that (i) its billboards were lawful when erected (Amended Complaint ¶ 12); (ii) it had invested substantial sums in developing its business in Raleigh (*id.* at ¶ 29); (iii) its investments were made "in reliance upon enactments reflecting assurance of the continued availability of outdoor advertising in the City of Raleigh" (*ibid.*); (iv) its billboards had a remaining useful life of at least 20 years and in most cases over 40 years (*id.* at ¶ 20); and (v) the effect of the ordinance was to destroy Naegele's business in Raleigh (*id.* at ¶ 25). See C.A. App. 59-65.

The district court denied Naegele's motion for summary judgment, granted summary judgment to Raleigh on the constitutionality of the ordinance, and ordered the action dismissed. App., *infra*, 11a-26a. In the court's view, the 1983 Ordinance satisfied the First Amendment because, as amended, it did not prefer commercial over non-commercial speech and was not impermissibly vague. *Id.* at 17a. In addition, the court held that the city was not required to have before it when legislating, or to present in court in defending its legislation, specific empirical evidence to support the reasonableness of the aesthetic and traffic safety justifications for the ordinance. Rather, the ordinance satisfied the First Amendment because Naegele had "presented no evidence tending to show that billboards do *not* negatively affect traffic safety" and aesthetics (*id.* at 20a; emphasis in original).

The district court also summarily rejected Naegele's Fifth Amendment Takings Clause claim. Without hearing any evidence on the value of Naegele's property, its investment-backed expectations, or the extent of its financial losses occasioned by the 1983 Ordinance, the court

held that "the five and one-half year amortization period, if reasonable, amounts to just compensation for Naegele's] loss." App., *infra*, 21a-22a. The court then concluded that the "amortization period" in the 1983 Ordinance was reasonable because it was longer than such periods upheld in other cases, because the period allowed recoupment of some of Naegele's investment in Raleigh, and because the company could engage in the billboard business elsewhere in North Carolina. *Id.* at 23a.

2. The court of appeals affirmed. App., *infra*, 1a-10a. Relying on *Metromedia*, it concluded that "a city may justifiably prohibit all off-premises signs or billboards for aesthetic and safety reasons" (*id.* at 6a). The court of appeals agreed with the district court that the amendment protecting non-commercial speech removed any ground for arguing that the 1983 Ordinance discriminated against non-commercial speech or was impermissibly vague (*id.* at 6a-7a).

With respect to the contention that the ordinance violated the Takings Clause, the court of appeals held that the "amortization period" comported with customary practice in zoning cases, was reasonable in duration, and did not "necessitate additional compensation." App., *infra*, 8a. Accordingly, the court sustained the grant of summary judgment upholding the Raleigh ordinance (*id.* at 9a-10a):

> While the theoretical principle cannot be said to vet 5½ years in any and all cases (we do not purport to hold that the owner of a sign can invariably recoup its investment in such a time span), nevertheless, in the present case, Naegele has not presented sufficient evidence to create a triable issue of fact on whether the period here was so unreasonable that it constituted a "taking" of Naegele's property.

REASONS FOR GRANTING THE PETITION

The billboard ordinance enacted by the City of Raleigh in 1983 destroys Naegele's property as completely and effectively as if the city had taken the property by eminent domain. In 1989, when the so-called "amortization period" expires, Naegele's billboards, which today are substantial income-producing assets, must be torn down and removed from the city, the physical structures being reduced to nothing more than scrap value. Furthermore, Naegele's interests in the parcels of land that serve as sites for its billboards will be rendered worthless. In return for this confiscation, Raleigh has offered no "compensation" other than a promise to delay the takings for 5½ years.

The Fourth Circuit's decision upholding the Raleigh ordinance against a Fifth Amendment challenge overlooks and cannot be squared with the repeated statements of this Court that "[t]he application of a general zoning law to particular property effects a taking if the ordinance * * * denies an owner economically viable use" of his property. *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980). See also *United States* v. *Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459 (1985). In light of the confusion in the lower courts concerning the precise contours of a "regulatory taking," the conflict among state supreme courts concerning the legality of billboard ordinances that mandate the removal of nonconforming uses without the payment of just compensation, and the substantial practical importance of the question presented to thousands of municipalities and businesses nationwide, review by the Court is plainly warranted.

A. This Court Has Recognized That Economic Regulation May So Diminish The Value Of Property As To Amount To A Taking.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public

use without just compensation."[4] Because the essence of a "taking," for purposes of the Fifth Amendment, is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign" (*Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1004-1005 (1984), quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945)), the Court has not limited the Takings Clause to actual physical occupations or governmental expropriations of property. Rather, the Court has long recognized that governmental regulation that deprives property of its economic value may amount to a taking. As the Court remarked more than a half-century ago: "Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, R.I. & P.R. Co.* v. *United States*, 284 U.S. 80, 96 (1931).

Of course, virtually every economic regulation restricts the use, and thereby diminishes the value, of the affected property. As Justice Holmes wrote for the Court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922), "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power." But the "general rule," the Court announced in *Mahon*, is that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

In determining how far is "too far," this Court has engaged in "ad hoc, factual inquiries" (*Penn Central Transp. Corp.* v. *City of New York*, 438 U.S. 104, 124 (1978)) that "call[] as much for the exercise of judg-

[4] This prohibition applies against the states through the Due Process Clause of the Fourteenth Amendment. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160 (1980); *Chicago, B. & Q.R. Co.* v. *Chicago*, 166 U.S. 226, 239 (1897).

ment as for the application of logic." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). Nevertheless, the Court has identified three factors bearing on the validity of a challenged regulation under the Takings Clause: (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation on the claimant," and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. See also *Connolly* v. *PBGC*, 106 S. Ct. 1018, 1026 (1986); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

As to the first factor—the character of the governmental action—the Court has attached significance to whether the regulation destroys all, most, or only some of the "full 'bundle' of property rights" that an owner possesses. See *Allard*, 444 U.S. at 66. "[T]he destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Ibid.* In addition, the Court has focused on whether the regulation imposes restrictions that apply generally, so that the owner of property subject to the regulation shares in the benefits as well as the burdens of the exercise of governmental power. See *Agins*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 131, 134-135.

As to the second factor—the economic impact on the property owner—the Court has weighed the diminution in value of the property affected. Although the Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' (*Penn Central*, 438 U.S. at 131), a taking occurs if the governmental action "has an unduly harsh impact upon the owner's use of the property" (*id.* at 127), works "a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land" (*Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984)), or "denies an owner economically viable use of his land" (*Agins*, 447 U.S. at 260). See *United States*

v. *General Motors Corp.*, 323 U.S. at 378 (a taking occurs if a regulatory action's "effects are so complete as to deprive the owner of all or most of his interest in the subject matter").[5]

As to the third factor—interference with distinct investment-backed expectations—the Court has held that some expectations of future development are entitled to protection under the Takings Clause, particularly where property has value only because of its future use. S *Penn Central*, 438 U.S. at 130 n.27. But "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1005, quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 161.

B. The Raleigh Billboard Ordinance Works A Regulatory Taking Of Naegele's Property In Violation Of The Takings Clause.

1. Judged by the foregoing standards, the 1983 Ordinance unquestionably constitutes a taking of Naegele's property. This Court recently summarized its approach to regulatory takings claims in *Riverside Bayview Homes*, stating unanimously that application of land-use regulations to a particular piece of property is a taking "if the ordinance * * * denies an owner economically viable use of his land." 106 S. Ct. at 459, quoting *Agins*, 447 U.S. at 260. The Raleigh billboard ordinance completely deprives Naegele of *all* economically viable use of its 174

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[5] See also *MacDonald, Sommer & Frates* v. *Yolo County*, 106 S. Ct. 2561, 2573 (1986) (White, J., dissenting) (claims of "denial of all economically feasible use of * * * property are certainly sufficient allegations of a regulatory taking to state a cause of action"); *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) ("government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property").

billboards and accompanying leaseholds. Justice Stevens' comment on the billboard ordinance at issue in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 543 (1981), is equally applicable here: "If the ordinance is enforced, * * * [a]ppellants' large and profitable outdoor advertising businesses will be destroyed." The Fifth Amendment prohibits government from doing that to private property, even for a worthy public purpose, without paying just compensation.

This conclusion is buttressed by consideration of the specific criteria discussed above. First, applying the initial *Penn Central* test and "focusing on the uses the regulations permit" (438 U.S. at 131), it would be hard to imagine a clearer case in which regulation has destroyed virtually the entire economic value of private property. Billboards are valuable because they can be used for expressive purposes. The 1983 Ordinance mandates that essentially all of Naegele's billboards subject to Raleigh's unencumbered legislative jurisdiction may no longer be utilized for those purposes within the city.[6] As a result, 174 existing billboards must be taken down; because they cannot simply be picked up and relocated, their only value will be as scrap.[7] By the same token,

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[6] Presumably because federal law requires the payment of just compensation for forced removal of existing signs alongside federally-aided highways (see 23 U.S.C. § 131(g)), Raleigh's ordinance does not require the removal of such signs. In addition, presumably to avoid opposition from the Raleigh business community, the ordinance does not require the removal of any on-premise signs. Thus, the 1983 Ordinance was possible only because it was structured to cost the public nothing and to limit its harm to property owners with no political power in the community.

[7] In granting summary judgment, the district court stated that "the city has no intention of seizing non-conforming billboards, and [Naegele] will be able to salvage at least parts of those structures and use them elsewhere." App., *infra*, 23a. The sole support offered for this erroneous assertion was the deposition of Donald Pierce, a Naegele official. But Pierce in fact stated that the signs, once taken down, would be "salvage material" (C.A. App. 354)—

Naegele's property interests in the parcels on which the billboards stand will be useless. See *Almota Farmers Elevator Whse. Co.* v. *United States*, 409 U.S. 470, 476-477 (1973).

Moreover, the economic impact of the 1983 Ordinance, measured by the diminution in value of Naegele's property, is devastating. In October 1983, Naegele had a large and profitable outdoor advertising business in Raleigh that was worth many millions of dollars. It owned several hundred billboards, each worth thousands of dollars. In 1989, solely as a result of Raleigh's billboard regulation, much of this property will become essentially worthless. What is more, the 1983 Ordinance also destroyed Naegele's reasonable investment-backed expectations. As noted above (see page 4, *supra*), Naegele substantially expanded and upgraded its investment in the billboard business in Raleigh in reliance on the 1979 Ordinance, which was a carefully crafted compromise that regulated permissible sizes and locations of billboards in the city and grandfathered nonconforming structures.

It should be noted in this regard that this case—unlike *Agins*, *Penn Central*, *San Diego Gas*, *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S. Ct. 3108 (1985), or *Yolo County*—involves an *actual, existing, lawful use of property*, made nonconforming by a subsequently enacted (and wholly unanticipated) land use regulation. By the stroke of a legislative pen, Raleigh

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that they could be used "in constructing new signs from time to time. Steel, of course, always has salvage value" (*ibid.*). There was *no* evidence in the record that billboards could simply be moved to other locations. Indeed, the only evidence was to the contrary: each billboard represents an investment for planning and procurement, labor, taxes, freight, and equipment costs that cannot be transferred to another site. See *ibid.* (most signs are custom-made for their original location). The district court's confusion underscores the error in granting the city's motion for summary judgment on Naegele's takings claim.

has ordered the removal of valuable, income-producing properties from the city's commercial and industrial areas in order to achieve alleged aesthetic and traffic safety goals. If Raleigh had chosen to carry out this program by physically seizing and destroying the billboards, in an effort to create more open space, it would be frivolous to suggest that that action—even if an otherwise lawful exercise of regulatory power—would not constitute a taking requiring the payment of just compensation. See *Berman* v. *Parker*, 348 U.S. 26, 36 (1954). No different result should follow because the city instead has ordered Naegele to destroy the same property for the same purpose. See *San Diego Gas*, 450 U.S. at 652 (Brennan, J., dissenting).[8]

Finally, it is significant to the takings analysis that the 1983 Ordinance is not a typical zoning regulation, which applies non-discriminatorily to all landowners in a given area. As this Court has observed, zoning regulations generally raise no Takings Clause problems because even those landowners whose developmental plans are inhibited by a zoning ordinance are benefited by the fact that their neighbors' plans are similarly inhibited. See *Agins*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 134-135. Not so with billboard ordinances. Regulations such as Raleigh's impose the *total* cost of "beautifying" the community on only a single property owner or small handful of owners. "The purpose of forbidding uncompensated takings of private property," however, "is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

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[8] See also Tribe, *American Constitutional Law* 460 (1978):

> [F]orcing someone to stop doing things with his property—telling him you can keep it, but you can't use it—is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else. Thus, a taking occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed.

be borne by the public as a whole.'" *Connolly* v. *PBGC*, 106 S. Ct. at 1027, quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). See also *Agins*, 447 U.S. at 260; *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); 1 Anderson, *American Law of Zoning* § 6.72, at 528 (2d ed. 1976) "([t]he nonconforming user should not be required to pay more than a fair share of the cost of implementing a comprehensive plan for community development").[9]

In sum, this is not a case where, despite restrictive land use regulation, a property owner is being allowed to continue a present use of its property and to earn a reasonable return on its investment, as in *Penn Central*, 438 U.S. at 136.[10] Nor is this a case where a property owner

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[9] This case is unlike *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), or *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915), where the Court held that a city could order the closure of a common law nuisance—in *Hadacheck*, a brick manufacturing plant whose operations in a residential neighborhood "seriously incommoded" its neighbors, and in *Reinman*, a livery stable that emitted "offensive odors" and was "productive of disease"—without the payment of compensation. See *Penn Central*, 438 U.S. at 125, 133 n.30; *id.* at 145 n.8 (Rehnquist, J., dissenting). Far from posing a threat to the public health, safety, or morals, outdoor advertising serves as an important medium of public expression clothed with protections under the First Amendment. In any event, the city did not argue below that Naegele's billboards could be removed without compensation on the ground that they were a public nuisance. See also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962) (upholding constitutionality of ordinance that had the effect of prohibiting further operation of a sand and gravel pit within town limits, but stating that governmental regulation may "be so onerous as to constitute a taking which constitutionally requires compensation" and noting that there was no evidence even remotely suggesting that the ordinance in that case reduced the value of any property).

[10] For example, a regulation that prohibited the advertising of cigarettes or liquor on billboards might reduce the potential profitability (and therefore value) of a company's signs without amounting to a taking, so long as other substantial economically productive uses of the property remained available. (We put to one side the First Amendment issues such a law would present.)

is being denied merely the possibility of future economic development, as in *San Diego Gas* or *Williamson County*.[11] Instead, "the government [has not] simply take[n] a single 'strand' from the 'bundle' of property rights: it [has] chop[ped] through the bundle, taking a slice of every strand." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), quoting *Allard*, 444 U.S. at 66.

2. If, as we contend, the 1983 Ordinance effects a taking of property for a public use, then the regulation violates the Takings Clause, because it does not provide for the payment of just compensation—or, in fact, for any compensation at all. The courts below disagreed, holding that "the five and one-half year amortization period * * * amounts to just compensation for [Naegele's] loss." App., *infra*, 21a-22a. See also *id.* at 3a (amortization period "was granted owners of non-conforming signs in lieu of any other form of compensation"). But neither court purported to explain how a delay of several years in taking someone's property could possibly constitute "just compensation" for that property. As this Court has observed, " 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970) (footnotes omitted). "Amortization," whatever the period chosen, gives a property owner *nothing* that he would not have had absent the taking.[12]

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[11] For example, a regulation that prohibited the erection of billboards in new areas would not ordinarily amount to a taking because it would not destroy a settled property interest or reasonable investment-backed expectation. (Again, we put to one side First Amendment considerations.)

[12] It also is irrelevant to the just compensation inquiry that Naegele may continue to operate its billboard business alongside federally-aided highways and in other cities in North Carolina. See App., *infra*, 23a. A government could hardly justify taking a

Indeed, the lower courts in this case appear to stand alone in concluding that an "amortization period" satisfies the constitutional requirement of just compensation. Other courts have relied on amortization provisions in upholding billboard ordinances, but they have done so on the wholly different (albeit erroneous) theory that a regulation that constitutes a reasonable exercise of the police power cannot, as a matter of law, effect a taking of property within the meaning of the Fifth Amendment. See pages 20-21, *infra*. These courts appear to hold that a billboard regulation requiring the removal of nonconforming uses is reasonable if it contains an "amortization period" of sufficient duration. See, *e.g.*, *Art Neon Co.* v. *City and County of Denver*, 488 F.2d 118, 121-122 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974).

This effort to avoid the mandate of the Takings Clause is equally flawed, because there is no inconsistency between a valid exercise of the police power and a regulatory taking requiring the payment of compensation. For example, the Court stated in *Agins*, 447 U.S. at 260, and has repeated several times since (see, *e.g.*, *Riverside Bayview Homes*, 106 S. Ct. at 459), that a regulatory taking occurs *either* if the regulation fails to advance a legitimate state interest *or* if it denies the property owner all economically viable use of his land. The clear implication is that a regulation can serve a wholly legitimate state interest and still be a taking. In cases such as *Penn Central*, there was no dispute that the city was engaged in regulation well within its police power (see 438 U.S. at 129); the Court nonetheless debated at length whether a regulatory taking had occurred, and three Justices in fact concluded that one had.[13]

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house without paying compensation on the ground that the owner could build an identical house elsewhere or that he already owns another, similar structure.

[13] See also *United States* v. *Security Industrial Bank*, 459 U.S. 70, 75 (1982); *Loretto*, 458 U.S. at 425; *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 193 (1928).

Whatever the constitutional or other basis for an "amortization period," therefore, it plainly cannot serve as a substitute for the payment of just compensation for a taking of property, as the courts below held. See, *e.g.*, the billboard removal section of the federal Highway Beautification Act, 23 U.S.C. §§ 131(e) and (g), which contains *both* a 5-year delayed-removal provision *and* a just compensation requirement.

C. The Constitutionality Of Billboard Removal Ordinances Is An Issue Of Substantial Practical Importance On Which The Lower Courts Are In Disarray.

The decisions of the lower courts exhibit substantial confusion and uncertainty concerning the legality of ordinances requiring the removal, without compensation, of billboards or other structures or uses made nonconforming by a land use regulation. The majority view appears to be that a restrictive zoning ordinance that forces the termination of a nonconforming use over a set period of time is an exercise of general regulatory powers, which will be upheld if reasonable. As mentioned earlier, these opinions are premised on the erroneous view that the valid exercise of a governmental body's police power and the exercise of the taking power are somehow mutually exclusive concepts.

For example, in *New Castle* v. *Rollins Outdoor Advertising Co.*, 475 A.2d 355 (Del. 1984), a case involving a challenge to a three-year billboard amortization ordinance, the Delaware Supreme Court remarked that it had to resolve a "direct conflict" between a municipality's right to engage in reasonable regulation and an individual's right not to have his property taken without compensation. The court held that the property owner's right had to give way because "the forced termination of a nonconforming use over a specified period of time is a reasonable exercise of police power and does not constitute a taking of property in violation of due process rights."

Id. at 359. Similarly, in *Donrey Communications Co.* v. *City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900 (1983), cert. denied, 466 U.S. 959 (1984), the Arkansas Supreme Court upheld a municipal ordinance that granted nonconforming billboard owners a four-year amortization period, stating that the reasonable exercise of police power does not constitute a taking of property. 660 S.W.2d at 905. And in *State* v. *Joyner*, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 422 U.S. 1002 (1975), the North Carolina Supreme Court sustained the constitutionality of a zoning ordinance that forced a salvage yard operator to close his business within three years. The court held that "there is no distinction between requiring the discontinuance of a nonconforming use" and limiting the right of a landowner to modify, enlarge or extend a nonconforming use. 211 S.E.2d at 325, quoting *Los Angeles* v. *Gage*, 127 Cal. App. 2d 442, 459, 274 P.2d 34, 44 (1954).

Other courts have adopted a less rigid approach. In *Modjeska Sign Studios, Inc.* v. *Berle*, 43 N.Y.2d 468, 373 N.E.2d 255 (1977), appeal dismissed, 439 U.S. 809 (1978), for example, the New York Court of Appeals considered the constitutionality of a state statute requiring the removal of billboards after a 6½-year amortization period. The court held that the statute would not give rise to a taking unless the billboard owner were deprived of "all reasonable use of his property," that the "immediate removal of billboards without compensation in some instances might be an unconstitutional deprivation of property," and that an amortization period might well be an acceptable method of balancing public and private concerns. 373 N.E.2d at 260. It then remanded the case to allow the billboard owner an opportunity to prove at trial that its loss was "so substantial that it outweigh[ed] the public benefit gained by the legislation." *Id.* at 262. This opportunity, of course, was denied to Naegele when the district court granted Raleigh's motion for summary judgment.

A third group of courts has invalidated statutes and ordinances requiring the removal of nonconforming uses after an amortization period. The Missouri Supreme Court's decision in *Hoffman* v. *Kinealy*, 389 S.W.2d 745 (Mo. 1965), although not involving a billboard ordinance, plainly covers the instant situation (*id.* at 753; emphasis in original):

> To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use of property might be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a "reasonable" time. All of this leads us to suggest * * * that it would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon, and prompts us to repeat the caveat of Mr. Justice Holmes in [*Mahon*, 260 U.S. at 416] that "[we] are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

To similar effect are *City of Akron* v. *Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953), which held that the right to continue to use one's property in a way that does not constitute a nuisance and that "was lawful at the time [the property] was acquired" was protected by the Ohio Constitution and the Fourteenth Amendment (116 N.E.2d at 700), and *Loundsbury* v. *City of Keene*, 122 N.H. 1006, 453 A.2d 1278 (1982), which held that "even when a valid public purpose exists," the application of an ordinance requiring the removal of nonconforming billboards after an amortization period "constitutes a 'taking' requiring the payment of just compensation." 453 A.2d at 1281. See also *L. Grossman &*

Sons v. *Town of Gilford*, 118 N.H. 480, 387 A.2d 1178 (1978). And in *Ailes* v. *Decatur County Area Planning Comm'n*, 448 N.E.2d 1057 (Ind. 1983), cert. denied, 465 U.S. 1100 (1984), the Supreme Court of Indiana struck down ordinances requiring the elimination of nonconforming uses without compensation on the ground that "an ordinance prohibiting any continuation of an existing lawful use within a zoned area regardless of the length of time given to amortize that use is unconstitutional as the taking of property without due process of law and an unreasonable exercise of the police power." 448 N.E.2d at 1060.

It is essential that this Court resolve the conflict among the lower courts and provide guidance concerning the permissible limits of zoning ordinances requiring the removal of billboards without payment of compensation.[14] The outdoor advertising industry has made investments in billboards and real estate that are worth billions of dollars nationwide. See, *e.g.*, *The Wall Street Journal*, Sept. 16, 1986, p. 10 (reporting that Metromedia, Inc. recently sold its outdoor advertising business for $710 million). Many municipalities currently have some form of billboard regulations requiring the uncompensated removal of nonconforming uses, several of which are the subject of pending litigation.[15] The Fourth Circuit's de-

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[14] Commentators as well as lower courts are in disagreement over the constitutionality of billboard regulation. See generally 1 Anderson, *American Law of Zoning* § 6.67, at 509 (2d ed. 1976) ("Judicial reaction to amortization ordinances has been mixed, but most courts have approved the technique"); *id.* at § 6.72, at 527 n.97 (citing law review articles reflecting "[a] broad spectrum of opinion concerning the fairness and efficiency of amortization"); Comment, *Constitutionality of Sign Amortization Ordinances*, 9 Urban Law Ann. 303 (1975).

[15] Cases filed in 1986 alone include *Georgia Outdoor Advertising, Inc.* v. *City of Waynesville*, No. A-C-86-52 (W.D.N.C. Nov. 14, 1986) (upholding Waynesville billboard ordinance); *Harris County Outdoor Advertising Ass'n* v. *City of Houston*, No. 86-8560 (Dist. Ct.

cision sustaining the Raleigh ordinance is bound to encourage other local governments to attempt similar confiscatory legislation, and to lead to even further litigation.

D. The Four Regulatory Takings Cases On The Court's Current Docket May Shed Further Light On The Correctness Of The Fourth Circuit's Decision.

We have demonstrated thus far that the decision below warrants plenary review because it resolves an important constitutional question in a manner that conflicts with pronouncements of this Court and other courts. At a minimum, however, the Court should hold this case pending its decisions in several other regulatory takings cases scheduled to be heard during the 1986 Term.

The Court recently has granted review in four cases dealing with the Takings Clause of the Fifth Amendment:

1. *Keystone Bituminous Coal Ass'n* v. *Duncan*, No. 85-1092, cert. granted, 106 S. Ct. 1456 (Mar. 24, 1986) (argued Nov. 10, 1986), involves a challenge to the constitutionality of a Pennsylvania statute and regulations that require coal mine operators to leave up to 50% of their coal in place for support of certain surface structures. In contending that the Pennsylvania scheme violates the Takings Clause, the petitioners rely on *Pennsylvania Coal Co.* v. *Mahon*, *supra*, which held that a similar state regulatory statute went "too far" in destroying private property rights and thus violated the

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Harris Co. Oct. 29, 1986) (invalidating Houston billboard ordinance); *French* v. *City of Appleton*, No. 86 CV 231 (Cir. Ct. Outagamie Co. Sept. 5, 1986) (invalidating Appleton billboard ordinance); *Ackerley Communications of Massachusetts Inc.* v. *City of Somerville*, No. 86-322-WD (D. Mass. filed Dec. 5, 1986); *Whiteco Metrocom, Inc.* v. *City of Tucson*, No. 86-589 TUC (D. Ariz. filed Oct. 17, 1986); *Primary Media Corp.* v. *City of Orlando*, No. 86-116-Civ-Orl (M.D. Fla. filed Mar. 7, 1986); and *National Advertising Co.* v. *City of Pompano*, No. 86-6466 Civ-Paine (S.D. Fla. filed Apr. 29, 1986).

federal Constitution. Pennsylvania defends its statute and regulations by arguing that they serve "important, broad public interests" and have only a "minimal impact on the companies' property rights."

2. *FCC* v. *Florida Power Corp.*, No. 85-1658, prob. juris. noted, 106 S. Ct. 2273 (June 2, 1986) (argued Dec. 3, 1986), involves an attack on the federal Pole Attachments Act, 47 U.S.C. § 224, which directs the Federal Communications Commission to ensure that the rates charged cable television companies for the right to attach cables to utility poles are just and reasonable. The utility contends that FCC orders lowering the rates imposed pursuant to contracts with cable operators amounted to a taking without just compensation. The federal government disputes that a taking occurred, but argues that even if the FCC's rate orders were viewed as a taking, there would be no violation of the Fifth Amendment because the rates provide just compensation.

3. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, No. 85-1199, prob. juris. noted, 106 S. Ct. 3292 (June 30, 1986) (to be argued in January 1987), involves a challenge to a county flood control ordinance that prohibits all construction on certain property owned by the church. The church contends that the regulation (while perhaps a valid application of the police power) constituted a taking for which the county must pay just compensation, because the ordinance completely destroyed the economic value of the land. The county defends its regulation as "an essential and eminently reasonable exercise of the County's police power of a character which has never been regarded as an unconstitutional taking of property."

4. *Nollan* v. *California Coastal Comm'n*, No. 86-133, prob. juris. noted, 107 S. Ct. 312 (Oct. 20, 1986) (to be argued in February 1987), challenges a California statute providing that landowners must dedicate access across the beach area of their property to public use as a con-

dition on receiving a permit to construct, repair, or improve private property situated between the last public road and the ocean. The landowners contend that the regulatory order requiring that they grant the public an easement across their beach constitutes a taking of private property. The state responds by arguing that, "although the access condition caused a diminution in the value of the property, it did not deprive the owners of the reasonable use of the property."

Even these capsule summaries of the four cases demonstrate beyond question that the Court this Term will shed further light on the type or degree of regulation that constitutes a taking of property within the meaning of the Takings and Due Process Clauses. In particular, cases such as *Keystone* and *First English* may well require the Court to address the validity of the very assumption that underlies virtually all of the cases upholding billboard ordinances against constitutional attack—*i.e.*, that economic regulation amounting to a lawful exercise of the police power cannot, as a matter of law, effect a taking of property. In addition, the four takings cases almost certainly will require the Court to elaborate upon the three-factor approach to regulatory takings outlined above (see pages 10-13, *supra*).

Indeed, this case in many ways provides a far stronger basis than the pending cases for requiring the payment of just compensation for the destruction of property occasioned by governmental regulation. To begin with, the 1983 Ordinance totally destroys Naegele's property. *Keystone* and *First English*, by contrast, challenge regulations that merely limit the use that can be made of existing property, but preserve the status quo.

Furthermore, the statutes and ordinances involved in *Keystone* and *First English* were designed to deal with demonstrable and serious risks to the public safety. There can be little doubt about the dangers associated with

floods or the removal of all subsurface coal. It is therefore difficult to quarrel with the pressing public need for the regulations alleged to take property in those cases. Here, by contrast, the dangers said to arise from the existence of highway signs are far less significant and the benefits said to flow from their removal are far more speculative, and the governmental action at issue restricts expressive activity that enjoys some degree of special constitutional protection under the First Amendment.[16]

Finally, the underlying notion of the Takings Clause is that the public as a whole, and not just a few members of the public, should be required to pay for improvements designed to benefit everyone. See *Agins*, 447 U.S. at 260. As Justice Brennan explained in *San Diego Gas*, 450 U.S. at 656: "When one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." Whereas the benefits resulting from the regulations at issue in *Keystone* and *First English* would flow to only a small segment of the public (principally including the very people objecting to the regulations), the purported aesthetic and safety benefits anticipated from the elimination of billboards would be enjoyed by the entire populace. Ac-

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[16] See *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034, 2038 (1986), quoting *Taxpayers for Vincent*, 466 U.S. at 803 n.22 ("This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'"). If the district court had not aborted the evidentiary proceedings by granting the city's motion for summary judgment, Naegele would have attempted to show that billboards in industrial and commercial areas in fact have no adverse effect on traffic safety (see, *e.g.*, U.S. Dep't of Transp., Federal Highway Admin., *Analysis and Modeling of Relationships Between Accidents and the Geometric and Traffic Characteristics of the Interstate System* 20 (1969)) and cause little additional aesthetic harm given the proliferation of authorized signs in such areas. The 1983 Ordinance, for example, allowed more than 12,000 signs to remain standing in Raleigh. C.A. App. 370.

cordingly, it is more justifiable to make everyone pay for those benefits.

In sum, if the Court finds that the regulations in *Keystone* or *First English* effected a taking of property, *a fortiori* the Fourth Circuit's decision in this case would require further consideration. Certainly the Court ought not make final the many millions of dollars of injury inflicted on Naegele by the Raleigh ordinance while it is simultaneously in the process of a major reexamination of the application of the Takings Clause to governmental regulation.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to hold the petition pending its decisions in the four Takings Clause cases discussed at pages 24-28 and then dispose of it as appropriate in light of those decisions.

Respectfully submitted.

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DECEMBER 1986

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2093

MAJOR MEDIA OF THE SOUTHEAST, INC.,
d/b/a Naegele Outdoor Advertising Company
of Raleigh-Durham,
Appellant

v.

CITY OF RALEIGH,
Appellee

On Appeal from the United States District Court
for the Eastern District of North Carolina
(D.C. Civil No. 84-796)

Argued April 7, 1986

Filed June 12, 1986

Before: MURNAGHAN and WILKINSON,
Circuit Judges and
BUTZNER, Senior Circuit Judge

MURNAGHAN, Circuit Judge:

I.

Major Media of the Southeast, Inc., doing business as Naegele Outdoor Advertising Company ("Naegele") ap-

The original version of what became the October 1983 ordinance, as proposed, included a provision which stated that "[n]othing in this ordinance or in Section 10-2065 of the Raleigh City Code shall apply to non-commercial signs." The language was proposed because it was recognized that there might be "significant legal problems" if the ordinance was construed to favor commercial over non-commercial speech. *See Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981).

The proposed section excepting non-commercial speech from the scope of the ordinance's restrictions, however, was not included in the ordinance as initially passed. Naegele moved for summary judgment on December 3, 1984 on the grounds that the ordinance as passed was unconstitutional.[1] On December 4, 1984, the omission of the provision relating to non-commercial speech was brought to the attention of the Raleigh City Council; the Council met and enacted Ordinance 450 TC 228, which amended the October 1983 ordinance to include a provision which stated that "[a]ny sign authorized in this chapter is allowed to contain non-commercial copy in lieu of any other copy." The ordinance does not define "commercial" or "non-commercial" copy.[2]

Under the procedures specified by the Ordinance, if a sign (whether non-commercial or commercial) is to be

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[1] In fact the parties stipulated on December 3, 1984 that "[u]nder the Raleigh City Code in effect on the date of this stipulation, as contained in Exhibit A, an on-premise sign can contain copy solely relating to the business, etc. conducted on the premise where the sign is, but the use of otherwise identical on-premise signs to carry other messages is generally prohibited."

[2] The district court found that the amendment was passed by the defendant "to eliminate any potential constitutionality problems." Although the amendment is not free from potential ambiguity, it seems to allow non-commercial copy to be placed on any on-premise sign (or any permitted off-premise sign) instead of commercial copy.

erected, a permit must be requested and the copy or contents of the proposed sign display must be submitted to the relevant authorities. An inspector will then examine the application, classify the sign on the basis of its contents, and grant or deny the permit, depending on whether the sign is a permissible one for the zone where it is to be located. If a sign is proposed for an area where neither on-premise nor off-premise signs are allowed, the inspector must determine whether the copy is commercial or non-commercial. If it is non-commercial, it should automatically be allowed.[3] Because no occasion has arisen for an inspector to make such a determination, any potential abuse of these procedures must await whatever challenge, if any, may be made at a later date.

After the ordinance was modified to except non-commercial signs from regulation by the City, Naegele renewed its motion for summary judgment before the district court. The City also moved for summary judgment. On October 16, 1985 the district court entered an order granting summary judgment in favor of the City. Naegele had contended before the court that the ordinance was vague, standardless and a content-based infringement of its first amendment rights and that it gave the City unguided enforcement discretion, exceeding legitimate police power. Naegele also contended that the ordinance, as modified, preferred commercial over non-commercial speech in violation of *Metromedia, supra.*

The district court, in granting summary judgment in favor of the City, denied Naegele's contentions, and found that the Ordinance as modified did not offend *Metromedia* nor was it vague and standardless. The court determined that Naegele had not shown that there were any material questions of fact relating to the propriety of

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[3] Although both parties have argued this is the effect of the ordinance, it might also be read to exclude off-premise signs entirely in some areas, regardless of their contents.

the City's justification for the Ordinance on safety and aesthetic grounds. The court also found that Naegele's contention that the 5½ year amortization or grace period violated the taking clause of the Fifth Amendment (made applicable through the Fourteenth Amendment) was baseless. The court held that under the North Carolina law such an amortization period was valid if it were reasonable and amounted to just compensation. *State v. Joyner*, 286 N.C. 366, 375, 211 S.E.2d 320, 325 (1975), *appeal dismissed*, 422 U.S. 1002, 95 S.Ct. 2618, 45 L.Ed.2d 666 (1975). The district court held that the reasonableness of an amortization period was an appropriate matter for summary judgment determination. *See R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388 (1982), *cert. denied and appeal dism'd*, 307 N.C. 127, 297 S.E.2d 400 (1982). Under North Carolina law, the amortization period specified in the October 1983 Ordinance was reasonable.

II.

The Supreme Court having determined in *Metromedia, supra*, that a city may justifiably prohibit all off-premise signs or billboards for aesthetic and safety reasons, our discussion of Naegele's challenge to the Raleigh ordinance will be brief. The element of the San Diego sign ordinance found offensive to the First Amendment in *Metromedia*—the preference of commercial over noncommercial speech—was removed by the amendment passed by the Raleigh City Council on December 4, 1984. Whatever the effect of the ordinance before amendment, the ordinance now in effect does not run afoul of the First Amendment since it does not treat commercial speech more favorably. Because Raleigh's justifications for its ordinance are virtually the same as those enunciated by San Diego in *Metromedia, supra*, 435 U.S. at 509-10, 101 S.Ct. at 2893, we also find, as in *Metromedia*, that the ordinance does not impermissibly burden commercial speech.

III.

Naegele next contends that the ordinance is vague and contains no standard for guidance as to prohibited and allowable conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). We cannot agree. Although the ordinance provides no definition of "commercial" or "non-commercial" speech, sufficient guidance is given for such determination by City officials by the various decisions of the Court relating to billboards and commercial speech. We agree with the district court that "no codification of these terms is necessary, since the Supreme Court has already defined them." *See Central Hudson Gas & Elec. v. Public Service Comm'n.*, 447 U.S., 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980). In *Central Hudson Gas*, the Court stated that commercial speech was "expression related solely to the economic interests of the speaker and its audience." Although an occasional marginal case might arise raising the question of whether on the particular facts the definition of commercial speech would be correct, such an infrequent possibility should not in itself justify a generalized charge that the ordinance itself is vague, given the guidance afforded by court decisions in the area.

IV.

Naegele next contends that the Raleigh ordinance, even as amended in December 1984 to remove non-commercial speech from the purview of its regulations, still is written in such a way as to prefer commercial over non-commercial speech in violation of *Metromedia*. Naegele predicts that the owners of the property on which "on premise" signs are placed will not allow placement of signs on their property or premises which contain non-commercial copy. Even if the contention should prove to be true, it derives from decisions of the individual property owners. It has nothing to do with the Raleigh

ordinance, itself, which by its very terms does not affect non-commercial signs. The owners of such premises are free to place or to refrain from placing the non-commercial messages of others on their premises. *See Pacific Gas and Electric Co. v. P.U.C. of California*, —— U.S. ——, 106 S.Ct. 903, 910-11, 89 L.Ed.2d 1 (1986).

As we have previously ruled, the relevant ordinance for consideration here is that which includes the December 1984 amendment, not the October 1983 ordinance which inadvertently omitted the provision excepting non-commercial signs. It is implausible indeed that an ordinance containing restrictions amended to *exclude* non-commercial speech altogether from the ambit of the ordinance can be said to burden such speech.

V.

The Raleigh ordinance's 5½ year "amortization" period, perhaps more correctly called a grace period, allowing non-conforming signs to remain for 5½ years, is a familiar procedure in zoning cases like the present one. The period allowed by the City gave the owners of non-conforming signs a time in which their non-conforming use could continue and further allowed them a period during which they could recoup their investment. Such a course allows for a "middle ground" between summary termination of a non-conforming use and indefinite continuance of such a use. *Joyner, supra*, 286 N.C. 372-73, 211 S.E.2d at 324, citing 1 Anderson, American Law of Zoning, § 6.65, 446-47 (1968). Such amortization provisions have generally been held by courts not to necessitate additional compensation, if they are " 'reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner.' " *Id.* 286 N.C. at 374, 211 S.E.2d at 325, quoting *Harbison v. Buffalo*, 4 N.Y.2d 553, 562-63, 176 N.Y.S.2d 598, 605, 152 N.E.2d 42, 47 (1958). The

North Carolina Supreme Court held in *Joyner* that such an amortization provision was not *per se* unconstitutional which allowed only three years for removal of a non-conforming use. *Id.*

The district court also overruled Naegele's objection that determination of the reasonableness of such a provision was inappropriate for summary judgment. The district court noted that the factors which must be considered in order to determine the reasonableness of the grace period "include the length of the period and whether the public gain achieved outweighs the private loss suffered by owners of the non-conforming uses." *See Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977), *appeal dism'd*, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978). As the district court observed, other courts have held that shorter "amortization" periods were "reasonable." Several courts have made such determinations on summary judgment. In *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. at 702, 294 N.E.2d at 391, the North Carolina Court of Appeals found a 5½ year amortization period reasonable in light of *Joyner*. It was stated that the sign owners were not allowed to amend their complaint and that they were appealing from that order indicating the issue was one of law, ripe for decision rather than one of fact. *Id.* 294 N.E.2d at 390.

The second case cited by the district court as deciding the issue of reasonableness of amortization on summary judgment is *Donrey Communications Co. v. City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900 (1983), *cert. denied*, 466 U.S. 959, 104 S.Ct. 2172, 80 L.Ed.2d 555 (1984). In *Donrey*, the Arkansas Supreme Court affirmed a lower court's determination on summary judgment that a four year amortization period was reasonable.

While the theoretical principle cannot be said to vet 5½ years in any and all cases (we do not purport to hold that the owner of a sign can invariably recoup its invest-

ment in such a time span), nevertheless, in the present case, Naegele has not presented sufficient evidence to create a triable issue of fact on whether the period here was so unreasonable that it constituted a "taking" of Naegele's property.

The order of the district court is, accordingly,

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

Civil Action No. 84-796

MAJOR MEDIA OF THE SOUTHEAST, INC.,
d/b/a Naegele Outdoor Advertising Company
of Raleigh-Durham,

Plaintiff

v.

CITY OF RALEIGH,

Defendant

ORDER

Filed October 16, 1985

DUPREE, District Judge.

This action arose as a result of amendments made to the Raleigh City Code in 1983 regarding the regulation of billboards and signs within the city. These regulations had initially been enacted in 1979 and had permitted off-premise signs to be considerably larger than on-premise signs and also permitted off-premise signs to change their copy as frequently as desired.[1] The 1983 amendment substantially altered the regulations for off-premise signs. It reduced the number of zoning classifications in which billboards are allowed and reduced the amount of square

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[1] The regulation regarding on-premise signs is Raleigh City Code § 10-2065. The off-premise regulations are contained in Section 10-2066.

footage permissible per sign. It also provided for a five and one-half year amortization period from October 18, 1983 before any non-conforming signs would be removed.

Plaintiff subsequently brought this action challenging the constitutionality of the new ordinance. During discovery, it was discovered that a section of the ordinance presented to the City Council had been left out of the amendments. That section, which was to be placed in Section 20 of Raleigh City Code § 10-2066, provided as follows:

> Nothing in this ordinance or in 10-2065 of the Raleigh City Code shall apply to non-commercial signs.

As it turns out, this section was extremely important, for without it Section 10-2065 could be construed to be unconstitutional, because it would give commercial speech greater preference than non-commercial speech. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Supreme Court found a similar ordinance to be unconstitutional on exactly the same grounds.

Relying on this case, plaintiff filed a motion for summary judgment seeking to have the ordinance declared unconstitutional as a matter of law. However, on the same day that plaintiff filed its motion defendant, seeking to eliminate any potential constitutionality problems, substantially amended the ordinance. Of particular import is Section 4, which amends Section 10-2065 to provide as follows:

> Section 10-2065.4 Permitted Signs.
>
> Any sign authorized in this chapter is allowed to contain noncommercial copy in lieu of any other copy.

Because plaintiff in its complaint sought only declaratory and injunctive relief, the court concluded that any ruling on the constitutionality of Raleigh's ordinance would

have to be based on the ordinance as amended on December 4, 1984. The court then gave the parties additional time to seek further discovery and to subsequently resubmit their motions for summary judgment with such further memoranda and materials as they deemed necessary. Discovery has been completed, the parties have filed their motions, and the action is now ripe for disposition.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In its memorandum in support of its motion for summary judgment, plaintiff sets out two general grounds why the Raleigh City Code as it relates to signs is unconstitutional. First, plaintiff asserts that it is a vague, standardless, content-based infringement on plaintiff's First Amendment right to freedom of speech. Second, plaintiff contends that the Code violates due process because it gives city officials unguided enforcement discretion which exceeds the zoning power given to municipalities by the state legislature.[2]

However, both of these contentions center on the plaintiff's assertion that defendant has failed to adequately define the terms "commercial" and "non-commercial" as they relate to signs. As a result, it argues, non-commercial speech may be improperly restricted in violation of the First Amendment and billboard inspectors may be given unbridled discretion to violate plaintiff's due process rights by determining what speech is permitted and what is not. These contentions will be addressed seriatim.

1. *First Amendment*

In *Metromedia*, the Supreme Court addressed the question of what degree of speech could be regulated by a city

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[2] Plaintiff also argues that the part of the Code which is unconstitutional is not severable from other parts relating to signs and that consequently the whole section relating to signs must be deemed unconstitutional. This argument is addressed separately on pages [24a] through [25a], *infra*.

when enacting an ordinance limiting the use of signs within the city limits. San Diego's ordinance permitted on-site commercial advertising but forbade other commercial advertising (off-site signs) and non-commercial signs unless permitted by one of the ordinance's specified exceptions. A plurality of the Supreme Court ruled the statute unconstitutional because it improperly gave on-site commercial advertising preference over non-commercial advertising.

> Although the city may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of non-commercial speech to evaluate the strength of, or distinguish between, various communicative interests. . . . To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.

453 U.S. at 514-15, 101 S.Ct. at 2896 (citations omitted).

As stated before, plaintiff argues that even with the recent amendments, the Raleigh City Code as it relates to signs is still in violation of the First Amendment, due to the fact that it fails to define or provide any guidelines for the interpretation of the terms "commercial" and "non-commercial" as used in the city's sign regulations. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). In support of this contention, plaintiff points to the depositions of several city sign inspectors who gave varying interpretations of the two terms. Watkins Deposition at 43-48, 140-42; Strickland Deposition at 11, 22-25; Parker Deposition at 17; Wiggins Deposition at 8, 15-17; Barber Deposition at 11-13.

In response, defendant asserts first that no codification of these terms is necessary, since the Supreme Court has already defined them. In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,

447 U.S. 557, 561, 100 S.Ct. 2343, 2348-49, 65 L.Ed.2d 341 (1980), commercial speech was defined as being "expression related solely to the economic interests of the speaker and its audience." Defendant asserts that it would be improper for the city to attempt to give the term some other meaning. Defendant also contends that the statements given to plaintiff's counsel by the city's inspectors in response to hypothetical questions should be given little consideration at this time. These inspectors have not been given any instruction on the new ordinance because no necessity for interpretation has arisen. Watkins Deposition at 43. Defendant contends that it would be unfair to find the ordinance unconstitutional simply because the individual inspectors have not been instructed prior to any inspections as to how it should be interpreted.

The court must agree with these assertions. Where the courts have provided a city with specific guidelines with regard to the definition of applicable terms, the city need not include those definitions in its ordinance. The Supreme Court's discussion of commercial speech in *Central Hudson* should provide defendant with those guidelines. Furthermore, the Court expanded on this definition in *Metromedia* when it implicitly acknowledged as proper the City of San Diego's definitions of on-site and off-site commercial signs. San Diego defined an on-site commercial sign as "a sign advertising goods or services available on the property where the sign is located," and an off-site commercial sign as "a sign on a building or other property advertising goods or services produced or offered elsewhere." 453 U.S. at 503, 101 S.Ct. at 2890. The plurality expressly ruled that insofar as it regulated commercial speech the San Diego ordinance met the requirements of *Central Hudson*. *Id.* at 512, 101 S.Ct. at 2895.

Plainitff points to Justice Brennan's concurring opinion in *Metromedia* in support of its position that city

officials should not be given the right to determine whether a proposed message is commercial or non-commercial. 453 U.S. at 536-37, 101 S.Ct. at 2907-08. However, as defendant points out, Justice Brennan was in the minority on this point. Seven justices (four in the plurality and three dissenters) concluded that San Diego had the right to regulate the size and spacing of all commercial signs. None expressed any problems with the city's ability to distinguish between commercial and non-commercial advertising.

Thus, this court must similarly find that defendant's failure to define the terms "commercial" and "non-commercial" as they relate to signs does not render the sign ordinance unconstitutionally vague. These terms have been adequately defined in prior court decisions and those definitions need not be repeated in the ordinance to render it constitutional.

In a similar vein, plaintiff argues that even after the December, 1984 amendments to the ordinance, commercial signs still are treated more favorably than non-commercial ones in violation of the Supreme Court's ruling in *Metromedia*. First, they contend that an on-premise commercial sign is permitted merely by meeting the definition of on-premise sign,[3] while a non-commercial sign must also meet the approval of a zoning inspector, who, "in his unguided discretion, may wrongly determine that the proposed message is commercial . . . amounting to a prior restraint." Memorandum in Support of Plaintiff's Motion for Summary Judgment, filed July 22, 1985, p. 41. Second, plaintiff argues that non-commercial on-premise signs are subordinated to commercial signs because, "before a non-commercial message may be erected on a business premise, the structure to which that message is to be attached must independently qualify as an on-premise sign." Plaintiff's Memorandum, p. 42.

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[3] Raleigh City Code § 10-2002.

Neither of these contentions entitle plaintiff to relief. First, for the reasons set out above, zoning inspectors have not been given unbridled discretion to decide whether a particular sign is commercial or non-commercial. These inspectors have not yet been instructed on this issue because the need for such inspections has not yet arisen.

Plaintiff's second contention also does not entitle it to relief. The ordinance as amended gives no preference to commercial signs. Also, under the ordinance, the "structure to which the message is to be attached" need not *qualify* as an on-premise sign; rather, the structure must be *entitled* to have an on-premise sign. However, the city expresses no preference as to whether the message on the on-premise sign is commercial or non-commercial.

Plaintiff also argues that the ordinance is vague because it does not address the question of commercial signs offering real property for sale in residential districts. However, the Supreme Court has held that such signs are so unique, special and necessary and that alternative methods of selling residential real property are so inadequate that they cannot be prohibited. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). The state has acknowledged this exception and has provided in Section 2301.3(b) of the North Carolina Building Code that such signs are permissible so long as they are no more than fifteen square feet in size. Thus, it was not necessary for defendant to make any further provision in the Raleigh City Code regarding such signs.

Therefore, for the reasons set out herein, plaintiff's motion for summary judgment on the grounds that the Raleigh City Code as it relates to signs violates the First Amendment right to freedom of speech is denied.

2. *Due Process*

Plaintiff's due process claim again raises the argument that zoning inspectors are given too much discretion in

determining whether a sign is commercial or non-commercial. However, the court has already found that such is not the case. Accordingly, plaintiff's motion for summary judgment on due process grounds must also be denied.

Accordingly, for the reasons set out herein, plaintiff's motion for summary judgment is denied.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In support of its motion for summary judgment, defendant argues that the facts as set out hereinbefore show that the ordinance, as amended in December, 1984, is constitutional as a matter of law. Additionally, defendant asserts that plaintiff's challenge to the constitutionality of Section 10-2065 is barred by the applicable statute of limitations. In response, plaintiff asserts that defendant has waived the statute of limitations and that genuine issues of fact remain regarding whether defendant has adequately considered traffic safety and aesthetics, and whether the amortization period for removal of nonconforming signs is a reasonable exercise of the city's police power.

1. *Statute of Limitations*

Defendant contends that plaintiff's challenge to the provisions of Section 10-2065 is barred by the nine-month statute of limitations set out in Session Laws 1981, c. 891, s. 10. However, defendant did not raise this defense until it filed its memorandum in support of its motion for summary judgment on July 22, 1985. This motion was filed more than ten months after defendant's original answer was filed. An assertion that a claim is barred by the statute of limitations is an affirmative defense and must be included in the defendant's answer. Rule 8(c), F.R.Civ.P. Failure to do so constitutes a waiver of that defense. *Alexandria Hospital v. Heckler*, 586 F.Supp. 581

(E.D.Va.1984). Thus, defendant has failed to timely raise the defense of statute of limitations, and has given no reason for this failure. Therefore, it has waived the defense of statute of limitations, and its motion for summary judgment on those grounds must be denied.

2. *Traffic Safety and Aesthetics*

In support of its contention that these factors were not adequately considered, plaintiff asserts that no objective research or study was conducted by the defendant to determine the present impact of advertising signs in the city, nor did the city rely on any research conducted at other locations. Defendant also has failed to present evidence of one instance where a billboard caused an automobile accident. Maness Deposition at 223-30.

Nevertheless, the court believes that there remain no material questions of fact with respect to this issue. No empirical studies are necessary for reasonable people to conclude that billboards pose a traffic hazard, since by their very nature they are designed to distract drivers and their passengers from maintaining their view of the road. *See County of Cumberland v. Eastern Federal Corporation*, 48 N.C.App. 518, 524, 269 S.E.2d 672, 676, *petition for discretionary review denied*, 301 N.C. 527, 273 S.E.2d 453 (1980). Furthermore, defendant did engage in public hearings at which citizens expressed their concern about the traffic hazard billboards pose.

The question of traffic safety is also an issue generally left to the discretion of local officials. As the Supreme Court said in *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949),

> [w]e would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such

> a relation. And nothing has been advanced which shows that to be palpably false.

Id. at 109, 69 S.Ct. at 465, *quoted with approval in Metromedia, supra*, 453 U.S. at 509, 101 S.Ct. at 2893. Similarly, plaintiff in this action has presented no evidence tending to show that billboards do *not* negatively affect traffic safety.

With regard to aesthetics, a quote of Justice White's opinion in *Metromedia* is perhaps most appropriate.

> It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "esthetic harm." San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures. Such esthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

453 U.S. at 510, 101 S.Ct. at 2894 (footnotes omitted).

As the Supreme Court found with respect to the City of San Diego, this court has concluded that Raleigh's sign ordinance was not intended to limit certain forms of protected speech. Rather, it is a legitimate effort on the part of the City Council to promote an important public interest in maintaining traffic safety and the aesthetic appearance of the city.[4]

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[4] Defendant also points out that the sign ordinance is not the only project underway designed to improve the city's appearance. The city has also engaged in landscaping projects, sponsored the preservation of historic buildings, attempted to reduce litter, enacted an ordinance regulating placement of newsracks, and attempted to have future power lines placed underground. Affidavit of Ken Maness, dated December 20, 1984.

Not all legislative decisions warrant or are even capable of objective empirical studies. Defendant's ordinance limiting the size and spacing of on-premise and off-premise signs within the city's zoning jurisdiction was one such decision. Furthermore, "any exercise by a municipality of its police power is presumed valid, and when the reasonableness of an ordinance is debatable, judicial discretion gives way to legislative judgment." *Goodman Toyota, Inc. v. City of Raleigh*, 63 N.C.App. 660, 664, 306 S.E.2d 192, 194 (1983), *petition for discretionary review denied*, 310 N.C. 477, 312 S.E.2d 884 (1984). Absent more showing than has been made here, the court will not question defendant's expressed motives of improvement of traffic safety and aesthetics. *See A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 214, 258 S.E.2d 444, 449 (1979).

3. *Amortization Period*

Raleigh City Code § 10-2066.4 provides a five and one-half year amortization period for removal of all off-premise signs which do not conform to the Code as amended in October, 1983. Plaintiff first contends that no amortization period can amount to just compensation so as to come within the requirements of the Fifth and Fourteenth Amendments. However, the North Carolina Supreme Court has found otherwise. In *State v. Joyner*, 286 N.C. 366, 375, 211 S.E.2d 320, 325, *appeal dismissed*, 422 U.S. 1002, 95 S.Ct. 2618, 45 L.Ed.2d 666 (1975), the court followed the majority of other jurisdictions in the country, holding "that the provisions for amortization of nonconforming uses are valid if reasonable, and reject[ing] the *per se* rule holding all amortization provisions unconstitutional." Furthermore, plaintiff has pointed to no case or statutory law supporting the *per se* rule, and this court must therefore conclude that the five and one-half year amortization period, if reasonable, amounts to just compensation for plaintiff's

loss. *See also* 1 Anderson, American Law of Zoning, Section 6.65, 446-47 (1965).

Plaintiff next contends that summary judgment is not proper because the court cannot determine at this time that the amortization period set out in the Code is reasonable as a matter of law. The court disagrees. The factors to be considered when determining whether a particular amortization period is reasonable include the length of the period and whether the public gain achieved outweighs the private loss suffered by owners of the nonconforming uses. *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 402 N.Y.S.2d 359, 373 N.E.2d 255 (1977), *appeal dismissed*, 439 U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978). With respect to the length of the amortization period, numerous courts have ruled that much shorter periods were reasonable. *Donrey Communications Company, Inc. v. City of Fayetteville, Arkansas*, 280 Ark. 408, 660 S.W.2d 900 (1983), *cert. denied*, 466 U.S. 959, 104 S.Ct. 2172, 80 L.E.2d 555 (1984) (four-year period); *State v. Joyner*, *supra* (three years); *Village of Gurnee v. Miller*, 69 Ill.App.2d 248, 215 N.E.2d 829 (1966) (three years); *Naegele Outdoor Advertising Company v. Village of Minnetonka*, 281 Minn. 492, 162 N.W.2d 206 (1983) (three years); *Spurgeon v. Board of Commissioners of Shawnee County*, 181 Kan. 1008, 317 P.2d 798 (1952) (two years); *Standard Oil Company v. Tallahassee*, 183 F.2d 410 (5th Cir.), *cert. denied*, 340 U.S. 892, 71 S.Ct. 208, 95 L.Ed. 467 (1950) (one year); *McKinney v. Riley*, 105 N.H. 249, 197 A.2d 218 (1964) (one year); *City of Seattle v. Martin*, 54 Wash.2d 541, 342 P.2d 602 (1959) (one year).

In addition, in *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388, *cert. denied*, 307 N.C. 127, 297 S.E.2d 400 (1982), the North Carolina Court of Appeals reversed a decision of the trial court and held that a town ordinance prohibiting off-premise commercial signs and providing for a five and one-half

year amortization period was reasonable as a matter of law. The Supreme Court of Arkansas also ruled in *Donrey, supra,* that defendant's amortization period was reasonable as a matter of law. Finally, the constitutionality of a ninety-day amortization provision in Raleigh City Code § 10-2065.6 regarding non-conforming on-premise windblown and portable signs in the City of Raleigh was upheld in *Goodman Toyota v. City of Raleigh, supra.* Based on these cases, the court concludes that the five and one-half year amortization period set out in Raleigh City Code § 10-2066.4 is reasonable as a matter of law.

Furthermore, the balance of benefit to the public versus harm to the plaintiff favors the city as well. Plaintiff certainly may lose income as a result of the ordinance. However, the purpose of the amortization provision is to allow a party to recoup some of their investment, not to repay them for potential future income which is lost as a result of the city's actions. Furthermore, plaintiff's argument that its business will be ruined by this ordinance is suspect, at best. First, plaintiff's business is not limited to the City of Raleigh, but covers all of eastern North Carolina with at least seven hundred sign structures located in some fifty-two cities and communities. Pierce Deposition at 6, 59, 67. Second, many of plaintiff's lease agreements contain provisions which would relieve plaintiff of any obligations under the lease if governmental action forces the removal of a billboard. Pierce Deposition at 79 and Exhibit D to Defendant's July 22 1985 Memorandum. Third, Raleigh's ordinance does not eliminate all off-premise signs, but merely restricts their size and spacing. Fourth, the city has no intention of seizing non-conforming billboards, and plaintiff will be able to salvage at least parts of those structures and use them elsewhere. Pierce Deposition at 56. And finally, all signs on Interstate and Federal Aid Primary System roadways may remain as they are. In answers to in-

terrogatories, plaintiff admitted that eighty-one of its signs located within the Raleigh zoning jurisdiction fit within that category. Thus, it is unlikely that plaintiff's business will be ruined by the new ordinance.

As stated before, ordinances which provide for amortization periods for the removal of non-conforming structures are constitutional if those periods are deemed reasonable. Plaintiff has presented no evidence other than its own opinion to support its position that the period set out in Section 10-2066.4 is not reasonable, and has also failed to show that its business will be unfairly impacted as a result of this amortization scheme. As the exercise by a municipality of its police power is generally presumed valid, and as plaintiff has failed to show that defendant's actions in enacting this ordinance have been unreasonable, the court must conclude that the five and one-half year amortization period provided in Section 10-2066.4 is reasonable as a matter of law.

Finally, plaintiff asserts that it is entitled to an extension of the amortization period because prior to the December 4, 1984 amendments, the ordinance relating to signs was unconstitutional as a matter of law. However, because the provision dealing with off-premise signs, Section 10-2066, was not unconstitutional prior to that date, and because that provision is severable from Section 10-2065, the court concludes that plaintiff is not entitled to any extension of the amortization period.

To determine whether a portion of an enactment is severable from other portions, the court must determine first whether the remaining portion is valid and enforceable on its own and second, whether there is a legislative intent to enforce the remainder. *Cavanagh v. Brock*, 577 F. Supp. 176, 181 (E.D.N.C. 1983). With respect to the second determination, it is clear that the Raleigh City Council intended to enforce all valid sections of the sign code because they included severance clauses in both Sec-

tion 10-2065 and Section 10-2066. Ordinance No. (1983) 210 TC 198, § 23; Ordinance No. (1979) 982 T.C. 96, § 48. Those clauses state that if any portion of the ordinance is held to be invalid, such invalidity will not affect other valid provisions which can be given separate effect.

Plaintiff argues that despite this language, defendant would never have enacted an ordinance relating only to off-premise signs. However, such a severability clause carries the presumption that the legislative authority *would have* enacted the remaining provisions. *Champlin Refining Company v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932). For example, in *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969), the North Carolina Supreme Court held that a virtually identical provision in a Guilford County ordinance did reflect the legislative intent of the Board.

> When the statute, or ordinance, could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone. Here, the legislative body, the Board of County Commissioners, has expressly declared in the ordinance that it would have done so.

275 N.C. at 168, 166 S.E.2d at 87 (citation omitted). As with that case, it is clear that the Raleigh City Council intended that all valid provisions of its sign ordinance should continue to remain in effect even if other portions are declared invalid.

With respect to the first question, it is also clear that Section 10-2066 is valid and enforceable on its own. *Metromedia* only prohibits a municipality giving preference to commercial speech over non-commercial speech. It does not prohibit the regulation of certain types of commercial speech while not regulating others. Even if

Raleigh's on-premise sign ordinance was unconstitutional prior to December, 1984, there is no constitutional prohibition against regulating off-premise signs while failing to regulate on-premise signs.

Therefore, the severability clause in Section 10-2066 is valid. Consequently, the five and one-half year amortization period in that ordinance properly began to run against plaintiff's off-premise signs as of October, 1983, and plaintiff is not entitled to any extension of that period. Accordingly, for the reasons set out herein, defendant's motion for summary judgment is granted.[5]

CONCLUSION

In conclusion, it is hereby

ORDERED that plaintiff's motion for summary judgment be denied, defendant's motion for summary judgment be granted, and this action be dismissed.

---

[5] Plaintiff also argues that it intends to seek attorney's fees due to the fact that the December, 1984 amendments to Section 10-2065 were a direct result of this lawsuit being filed. However, this motion has not yet been filed, and the parties have not fully addressed the issues in their memoranda. Therefore, the court will refrain from considering this question until such time as a motion is filed and the issues have been briefed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2093

MAJOR MEDIA OF THE SOUTHEAST, INC., *etc.*,
Appellant,

versus

CITY OF RALEIGH,
Appellee,

OUTDOOR ADVERTISING ASSOC. OF AMERICA, INC.,
Amicus Curiae.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Franklin T. Dupree, Jr., District Judge

[Filed July 17, 1986]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Wilkinson and Judge Butzner.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-185

MAJOR MEDIA OF THE SOUTHWEST, INC.,
d/b/a NAEGELE OUTDOOR ADVERTISING COMPANY
OF RALEIGH-DURHAM,
Applicant,

v.

CITY OF RALEIGH, NORTH CAROLINA

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including December 14, 1986.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 15th day of September, 1986.

APPENDIX E

RALEIGH CITY CODE

Sec. 10-2002. Definitions.

* * * * *

Nonconforming sign. Any sign, including signs approved by the board of adjustment, which was lawfully erected and maintained prior to such time as it came within the purview of this chapter and any amendments thereto, but fails to conform to all applicable regulations and restrictions of this chapter.

Off-premise sign. Any sign or structure, pictorial or otherwise, regardless of size or shape which directs attention to a business, commodity, attraction, profession, service, or entertainment conducted, sold, offered, manufactured, existing, or provided at a location other than the premises where the sign is located or to which it is affixed. Sometimes called non-point-of-sale sign.

On-premise sign. Any sign or structure, pictorial or otherwise, regardless of size or shape which directs attention to a business, profession, commodity, attraction, service, or entertainment conducted, offered, sold, manufactured, existing, or provided at a location on the premises where the sign is located or to which it is affixed.

Sec. 10-2065. On-premise signage.

Purpose. Signs are herein regulated in the interest of promoting traffic safety, safeguarding public health and comfort, facilitating police and fire protection, preventing adverse community appearance and the overcrowding of land, and protecting the character of the area in which they are located. The regulations are designed to permit maximum legibility and effectiveness of signs and to prevent their overconcentration, improper placement, and excessive height, bulk and area. In general, it is intended

that signs of a general commercial nature be prohibited in areas where commercial activities are prohibited and that signs in less restrictive business and industrial areas be regulated to the extent necessary to protect the character of the area and to conserve property values. Further, that because aesthetic value of the total environment does affect economic values of the community, and the unrestricted proliferation of signs can and does detract from the economic value of the community, it is the intent of this chapter to provide limiting controls, where necessary, to preserve community scenic, economic, and aesthetic values.

Sec. 10-2065.4. Permitted signs.

Any sign authorized in this chapter is allowed to contain noncommercial copy in lieu of any other copy.

Sec. 10-2066. Off-premise signage (outdoor advertising signs).

Purpose: For the purpose of regulating excess signage, encouraging the positive economic development of the city, promoting the safety of the traveling public, protecting existing property values in both residential and nonresidential areas, preventing the overcrowding of land, promoting a positive community appearance as part of a concerted city-wide effort to protect and enhance the aesthetics of the capital city for the enjoyment of all ciitzens of North Carolina, outdoor advertising signs are herein regulated.

The regulations are designed to prevent their overconcentration, improper placement, and excessive height, bulk, number, and area. It is recognized that, unlike on-premise identification signs which are in actuality a part of a business, outdoor advertising is a separate and distinct use of the public thoroughfare. With a view to this distinction, outdoor advertising signs are regulated differently from on-premise signs. It is intended

that outdoor advertising signs be located away from residential areas, and that such signs be regulated to protect the character of the area wherein outdoor advertising signs are located, and to conserve property values in these areas.

Sec. 10-2066.1. Design regulations.

All outdoor advertising signs shall be consistent with all definitions and shall comply with all standards and regulations of this Code. Except for ordinary maintenance, poster panel replacements, copy changes, or repair not involving structural, material, or electrical changes, no outdoor advertising signs, or part thereof, shall be erected, altered, constructed, changed, converted, re-erected, additionally illuminated, reduced in size, enlarged, or moved unless the entire outdoor advertising sign and structure are brought into conformity with this Code.

1. **Area of outdoor advertising signs.** No outdoor advertising sign facing streets with four (4) or more traffic lanes may exceed one hundred and fifty (150) square feet; outdoor advertising signs facing streets with fewer than four (4) traffic lanes may not exceed seventy-five (75) square feet. * * *

* * * * *

4. **Construction standards.**

* * * * *

d. **Spacing of signs.** No part of any outdoor advertising sign shall be located less than one thousand (1,000) feet from any part of another outdoor advertising sign when located within either of two (2) two-hundred-foot corridors along each side of a roadway. * * * No part of any permitted outdoor advertising sign which is located outside of the two-hun-

dred-foot corridor areas may be located within a one-thousand-foot radius of any other outdoor advertising sign.

Sec. 10-2066.4. Nonconforming off-premise signs (amortization).

All nonconforming outdoor advertising signs shall be discontinued or made conforming (amortized) within five and one-half (5½) years from the effective date of this section (October 23, 1983) unless explicitly prohibited by state statute. All outdoor advertising signs which are made nonconforming by an amendment to this chapter, or to the official zoning map, or extension of the areas in which this section is applicable shall be discontinued or made conforming (amortized) within five and one-half (5½) years after the date of such amendment or extension, unless explicitly prohibited by state statute.

Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a
NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,
Petitioner,

v.

CITY OF RALEIGH,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an ordinance that allows off-premise sign businesses, the placement of new off-premise signs without regard to their content, and the replacement of existing nonconforming off-premise signs with conforming off-premise signs without regard to the content of the sign's copy, but requires the removal of some nonconforming signs after an amortization period of 5 1/2 years, constitutes a taking of property without just compensation or a denial of due process in violation of the Fifth and Fourteenth Amendments.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-981

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a/
NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,
Petitioner,

v.

CITY OF RALEIGH,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT

In 1979 the City of Raleigh, hereinafter referred to as "Raleigh", amended its sign regulations by enacting ordinances regulating on-premise signs and off-premise signs. C.A. App. 369. Because of what appeared to be a proliferation in number and an increase in size of signs during 1982 and 1983 Raleigh amended its off-premise sign regulations on October 18, 1983, C.A. App. 405. The amendments to the off-premise sign ordinance generally decreased the allowed size of off-premise signs, restricted them to Industrial-I and Industrial-II zoning areas, and increased the spacing between signs. Because they are too large in area or too closely spaced, most of Petitioner's, hereinafter

"Naegele", signs were made nonconforming. Except for the 81 sign structures containing approximately 170 signs located on Federal Aid Primary Roads and protected by the Highway Beautification Act, 23 U.S.C. 131, Naegele's nonconforming signs must be removed at the expiration of a 5 1/2 year amortization period. C.A. App. 405. Naegele may, of course, install new signs complying with the ordinance at any time.[1] The parties have stipulated that the City does not regulate the content of Naegele's signs. J.S.F. #21, C.A. App. 46.

The off-premise sign ordinance was adopted pursuant to public hearing at which testimony regarding the issues of traffic safety and esthetics was heard. C.A. App. 298-301, 317-327. Investigation was made of other amortization provisions, including Raleigh's own existing on-premise sign ordinance, to discover a fair period which had been upheld by the courts, C.A. App. 292.[2]

Raleigh's off-premise sign regulations are a valid exercise of its police power and contrary to Naegele's gross misstatement on page 6 of its petition, the Court of Appeals did not find the effect of the ordinance to be "devastating". That characterization is Naegele's and Naegele's alone.

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[1] On October 22, 1986, the Raleigh City Council held a public hearing on proposed amendments to its on-premise sign regulations which, inter alia, would implement a 5 1/2 year amortization period for nonconforming on-premise signs.

[2] The on-premise sign ordinance, §10-2065.6 Raleigh City Code, contains a ninety (90) day amortization provision for certain on-premise signs. App., infra, 5a. This provision was held constitutional by the North Carolina Courts. *Goodman Toyota v. City of Raleigh*, 64 N.C. App. 660, 306 S.E. 2d 192 (1982) (pet. for discretionary review denied 310 N.C. 477).

The City of Raleigh has enacted an ordinance that does not destroy Naegele's business. Raleigh still permits off-premise signs without regard to their content. Pet. App. 30, 31, App. infra 6a. The only differences between the new regulations and the old are that a fewer number of signs will be permitted and those will be smaller in size.

THE LITIGATION

On July 17, 1984 Naegele brought this action in the United States District Court for the Eastern District of North Carolina. In its Complaint, Naegele alleged violations of the First, Fifth and Fourteenth Amendments to the Constitution. After discovery, Naegele moved for summary judgment on first amendment grounds. Raleigh moved for summary judgment on all issues. Pet. App. 18a. Naegele's Fifth amendment claim contended that the Raleigh amortization plan forced a removal of private property for a public purpose without payment of compensation. Naegele's Complaint alleged, inter alia, that:

> 25. This forced removal or abatement of use of its billboards constitutes taking of its property without just compensation and impairment of the obligations under its various contracts. The total effect of the scheme of the Code is to destroy the business of Naegele, not merely in the specific location of a particular sign, but its business throughout the City of Raleigh, the whole metropolitan area and beyond. For this taking there is to be no compensation.

Amended Complaint ¶25 C.A. App.[3]

The District Court rejected Naegele's Fifth Amendment Takings Clause claim. The Court heard no evidence from Naegele on that claim because Naegele chose not to present any evidence in spite of its burden to do so pursuant to the Federal Rules of Civil Procedure and in spite of the fact that Raleigh had raised the issue on summary judgment and had presented evidence regarding value and appropriate amortization periods. The plain language of Rule 56(c) of the Federal Rules of Civil Procedures mandates the entry of judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other materials negating the opponent's claim although, in this case, Raleigh did just that. Even if Raleigh had only raised the issue and presented no evidence on the amortization question, Naegele was still obligated to come forward with a response other than the mere conclusionary allegations of the Complaint. See *Celotex Corporation v. Myrtle Nell Catrett, administratrix of the estate of Louis H. Catrett, deceased,* 106 S. Ct. 2548.

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[3] Interestingly enough, and in spite of the Petitioner's claims, there have been erected since the enactment of the regulations in question, at least five new billboards which conform in every way to the new regulations.

REASONS FOR DENYING THE PETITION

A. THE RALEIGH BILLBOARD ORDINANCE DOES NOT WORK A REGULATORY TAKING OF NAEGELE'S PROPERTY IN VIOLATION OF THE TAKINGS CLAUSE.

Raleigh's ordinance in no way works a taking of any of Naegele's property.[4]

It is clearly settled in North Carolina and the majority of jurisdictions that amortization is a legal and effective method for the removal of nonconforming uses. There can be no question as to the validity of the process. See *State v. Joyner*, 286 N.C. 366, 21 S.E. 2d 320, appeal dismissed 422 U.S. 1002, 95 S. Ct. 2618, 45 L. Ed 2d 666 (1975).

An amortization provision is the proper subject for a grant of summary judgment. See *Donrey Communications Company, Inc. v. City of Fayetteville, Arkansas*, (cert. denied), 466 U.S.959, 80 L.Ed 2d 555, 104 S. Ct. 2172, (1984). Same case below, 280 Ark 408, 660 S.E. 2d 900 (1983). In *Donrey*, the United States Supreme Court refused to grant certiorari to hear an appeal from a summary judgment granted on behalf of the City of Fayetteville and sustaining, inter alia, a smaller billboard than that allowed in Raleigh and a shorter, four year, amortization requirement. Since there is no federal zoning law and therefore no federal law of nonconforming uses, the *Donrey* case is as close as we are likely to come in federal "ap-

---

[4] Since the passage of the ordinance in October, 1983 and the filing of this lawsuit in July, 1984, the Petitioner company has been sold to a new owner. It is difficult to believe that the new owner bought a business that was "devastated" and could no longer exist in Raleigh.

proval" of amortization.[5] Defendant sincerely hopes that this Court will closely study *Donrey* for its similarity to the Raleigh fact situation and its treatment by the court.

The reasoning behind the utilization of amortization provisions to displace nonconforming uses is well stated by Professor Anderson as follows:

> "Municipalities which seek to terminate nonconforming uses through amortization proceed on the assumption that the public welfare requires that such uses cease, but that summary termination is illegal, impractical or unfair. They find a middle ground, between immediate cessation of use and the indefinite continuance thereof by adopting regulations which permit the nonconforming uses, or some of them to continue for a specified period, but which require them to end the prohibited use upon the expiration of that period. The term 'amortization' is derived

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[5] The Highway Beautification Act as originally written allowed the amortization of billboards by local zoning regulation. 23 U.S.C.S. 134. The courts had the opportunity to rule on this question and upheld the ability of cities to amortize billboards over the five year period set out in the Highway Beautification Act. *Donnelly Advertising Corp. v. Baltimore*, 279 Md. 660, 370 A. 3d 1127 (1970), *Modjeska Sign Studios, Inc. v. Berle*, 55 App. Div. 2d 340, 390 N.Y.S. 2d 945 (1977) rev'd on other grounds 43 N.Y. 2d 468, 402 N.Y.S. 2d 359, 373 N.E. 2d 255, app. dismd. 439 U.S. 809, 58 L. Ed 2d 101, 99 S. Ct. 66.

In 1978 the Billboard Lobby was able to convince Congress to take this right from the states and to require monetary compensation. However, the amortization provision was held constitutional while in effect.

> from the notion that the nonconforming user can amortize his investment during the period of permitted nonconformity. It is reasoned that this opportunity to continue for a limited time cushions the shock of the restriction, dulls the edge of popular disapproval, and improves the prospect of judicial approval."

[1 Anderson, American Law of Zoning, § 6.65, 446-47 (1980)]

In 1974, North Carolina joined the growing majority of states which allow the amortization of nonconforming uses. *State v. Joyner*, supra.

The majority of courts addressing amortization provisions have held those provisions to be valid if reasonable. See Annot., 22 A.L.R. 3d 1134 (1968). See also, *Standard Oil Co. v. Tallahassee*, 183 F. 2d 410 (5th Cir. 1950); *National Advertising Co. v. County of Monterey*, 211 Cal. App. 2d 374, 27 Cal. Rptr. 136 (1962); *Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P. 2d 34 (1954); *Eutaw Enterprises, Inc. v. Baltimore*, 241 Md. 686, 217, A. 2d 348 (1966). See also comment, Amortization of Nonconforming Uses, 7 Wake Forest L. Rev. 255 ((1971).

It is interesting to note that one of plaintiff's affiliated companies, Naegele Outdoor Advertising Company of Minnesota, was subjected to a three year amortization period for some of its signs. *Naegele Outdoor Advertising Company of Minnesota v. Minnetonka*, 281 Minn. 492, 162 N.W. 2d 206 (1968).

The amortization provision (§10-2065.6) App., infra 5a, of the defendant's on-premise sign ordinance was upheld by the N.C. Court of Appeals. *Goodman Toy-*

ota v. City of Raleigh, 64 N.C. App. 660, 306 S.E. 2d 192 (1982, pet. for discretionary review denied, 310 N.C. 477). More recently, the North Carolina Courts have sustained a 5 1/2 year billboard amortization period. *Givens v. Town of Nags Head*, 58 N.C. App. 697, 294 S.E. 2d 388 (1982). The Givens case was later appealed to the United States District Court for the Eastern District of North Carolina and subsequently to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit upheld the amortization provision in an unpublished opinion. *Givens v. Town of Nags Head*, et al., No. 84-1653, (4th Cir. April 2, 1985).

It is sufficient to say that the Constitution has never quaranteed that one may use his property to engage in a particular business. A "taking" in the due process sense is only shorthand for "unreasonable, arbitrary or capricious". A "taking" and a valid exercise of the police power are mutually exclusive concepts absent a physical invasion of the property which justifies the findings of a taking in the eminent domain sense. The real property upon which plaintiff's signs rest remains unfettered for all the other uses available pursuant to the City zoning code. App. infra 1a-4a. No physical invasion of the property has occurred. "By merely entering into a lease specifically for the purpose of erecting a billboard, a lessee is not immunized from regulation of billboards under the police power. *Modjeska Sign Studios v. Berle*, 43 N.Y. 2d 468, 402 N.Y. 2d 359, appeal dismissed, 439 U.S. 809 (1977).

Recovery of investment sufficiently ameliorates private loss. *Joyner, Modjeska*, supra, and 22 A.L.R. 3d 1134. Loss of the expectation of more is not com-

pensable or reason to frustrate a zoning scheme. That is the price of living in an orderly society. To expect a return of the present market value or the market value at the time of the enactment of the ordinance, frustrates changes and improvement (as if the emergence of a better zoning scheme proves that the government was foolish and must pay for that foolishness). The Constitution has never made the government the guarantor of profits or appreciated values, particularly when those values are originally created by the government. See *Agins v. Tiburon*, 447 U.S. 225, 65 L. Ed 2d 106, 100 S. Ct. 2138 (1980).

Naegele indicates through discovery that it has no idea of its investment in sign plant in Raleigh due to the fact that its service area includes some 1,800 sign faces, only about 400 of which are located in Raleigh. C.A. App. at 357. Mr. Pierce, Naegele's President, also indicates that the 1,800 sign faces equates to approximately 900 sign structures. C.A. App. at 357. Exhibit No. 9 to Mr. Pierce's Deposition indicates that the company's sign plant is worth $5,290,190. C.A. App. at 484. When divided by 900, the approximate number of sign structures in all of Naegele's service area, not just Raleigh, a value per sign of some $6,500 results. In addition, these signs may now be depreciated for tax purposes over a five year period. C.A. App. at 362, 518, Dep. p. 64, and 26 U.S.C. 168. This depreciation schedule means that all of the sign plant can be depreciated for tax purposes by the time the amortization period expires.

Additionally, some of the signs rent for $1,330 per month, C.A. App. at 342, while the rent paid to property owners for similar signs is about $100 per month.

C.A. App. at 364. If the sign was a two-faced sign, Naegele could be yielding over $2,600 per month while only paying $100 per month rental. This analysis, although admittedly simplistic, should make it clear that the amortization of a $6,500 investment over 5 1/2 years should not be difficult. Naegele could yield $171,000 in revenue in return for $6,600 rent and $35,000 sign cost.

Exhibit G (relating to painted bulletins, a type of billboard) to plaintiff's response to defendant's First Interrogatories also gives some information regarding the value of the sign in question. C.A. App. at 520-525. For example, that exhibit shows over 80 structures with a value of slightly over $900,000 yielding a per painted bulletin cost (investment) of less than $11,000 per bulletin. Exhibit G also indicates some of the painted bulletins were created as far back as 1956. The same exhibit also indicates that some of the smaller poster panel signs were erected for as little as $250.00.

In summary, Raleigh contends that amortization is reasonable for the following reasons:

1. The 5 1/2 year time limit imposed by the City is the same as that already approved for billboards in *Givens*, supra, and when considered in light of Naegele's investment in the signs as shown by the deposition of Mr. Pierce and the material produced pursuant to interrogatories and motion to produce. Also, this Court has refused to hear the case of *Donrey Communications Company v. City of Fayetteville, Arkansas*. *Donrey* deals with a shorter (4 years) amortization period.

2. §10-2066 of the Raleigh City Code will allow those signs to remain, pursuant to the Federal and State Highway Beautification Acts, which front on Interstate and Federal Aid primary roads. There are approximately 81 of these signs. App. at 506.

3. Plaintiff will be allowed to maintain appropriately sized and spaced displays in Industrial-I and Industrial-II zoning districts even after the expiration of the amortization period. App. at 445. The ordinance does not prohibit the erection of new signs so long as they comply with the ordinance. App. infra 6a.

4. Naegele is engaged in other facets of the sign business and nothing in §10-2066 of the Raleigh City Code would prohibit the maintenance of that business. C.A. App. at 340.

5. Naegele has some 700 sign structures (Pierce Dep. p. 59) located in some 52 cities and communities in North Carolina (Pierce Dep. p. 6). C.A. App. at 340, 357. Naegele's structures, or at least parts of them, may be relocated if removed and could be used in these other areas. C.A. App. at 365. The City of Raleigh has never indicated any intention to physically seize the assets of plaintiff and plaintiff has made no allegation of seizures or offered any evidence of the same.

   In addition, Naegele admits that its signs are of an industry standard in size. C.A. App. at 34. It takes little imagination to realize that these "standard" size signs could easily be placed in one of the over four dozen jurisdic-

tions besides Raleigh where Naegele does business.

6. Many of Naegele's lease agreements contain provisions which relieve plaintiff of obligation under the lease if governmental action should make it no longer legal to maintain a billboard on the premises. C.A. App. at 368, 507-517. Therefore, Naegele is relieved of any responsibility for the property or to the property owner. What has Naegele lost?

7. None of the company's leases show any evidence of recordation as required by N.C.G.S. 47-18 and therefore are of no effect regarding lien holders and purchasers for value. The lack of recordation makes the continuation of the lease at any particular location determinable by the lessor and his desire to do something else with his property. C.A. App. 363, 364. Again, since the private property owner leasing to Naegele could sell or ask Naegele to leave at any time, how is Naegele in any worse position because of the City's regulations?

8. Naegele continued to erect signs and renew leases after the passage of the ordinance (October 18, 1983) and, pursuant to the holding in *Joyner*, supra, is entitled to no amortization of those signs. C.A. App. 352.

9. Naegele will enjoy an essential monopoly position in large billboards for the 5 1/2 year amortization period.

B. THE LOWER COURTS ARE NOT IN DISARRAY OVER THE CONSTITUTIONALITY OF BILLBOARD REMOVAL ORDINANCES.

The overwhelming majority of jurisdictions allow the amortization of nonconforming uses. The best Petitioner can do is cite some contrary state court decisions, most of which were decided on independent state constitutional or statutory grounds. e.g. *French v. City of Appleton*, No. 86 CV 231 (Cir. Ct. Outagamie Co. Sept. 5, 1986). Respondent is unable to find any conflicts on this issue at the Federal Court of Appeals level or indeed, even at the Federal District Court level. As the United States Supreme Court's Supervisory Power is first directed at maintaining uniformity at the Circuit Court level and secondarily perhaps at the District Court level, it is difficult to see why the Court should take its precious time to resolve conflicts where none exist. The United States Supreme Court has had many opportunities over the years to deal with amortization provisions and has uniformly declined to do so. See *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Art Neon Co. v. City and County of Denver*, 488 F. 2d 118 (10th Cir. 1973), cert. denied, 417 U.S. 932 (1974); *Modjeska Sign Studio, Inc. v. Berle*, 43 N.Y. 2d 468, 373 N.E. 2d 255 (1977), appeal dismissed, 439 U.S. 809 (1978); and *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320, appeal dismissed, 422 U.S. 1002 (1975).

The *Joyner case*, supra, is important because it is the landmark North Carolina case dealing with amortization. This Court had the opportunity for review but the appeal was dismissed. A case with a fact situation amazingly similar to this case is *Donrey*

Communications Co. v. City of Fayetteville, 280 Ark. 408, 660 S. W. 2d 900 (1983), cert. denied, 466 U.S. 959 (1984). The Fayetteville ordinance dealt with two zoning classifications and a four year amortization period. Again, this Court declined to review.[6]

C. THE REGULATORY CASES PRESENTLY BEFORE THE COURT ARE SO FACTUALLY UNRELATED TO THIS CASE AS TO BE UNUSABLE FOR ANALYSIS OF THE FOURTH CIRCUIT'S DECISION.

The four Takings Clause cases now pending before the Court are not related to the issues in this case. A brief discussion of each case follows:

1. *Keystone Bituminous Coal Ass'n v. Duncan*, No. 85-1092, cert. granted, 106 S. Ct. 1456, (Mar. 24, 1986) (argued Nov. 10, 1986). This case involves a requirement to leave up to 50% of a coal producer's product in the ground in order to support the overlying surface uses of the land. This state law may deprive the owners of the use of their coal and may involve interference with preexisting

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[6] Footnote 15 found at pages 23 and 24 of Petition attempts to describe the rash of billboard related litigation filed recently. It is worth noting that of the federal court cases cited and decided at this writing, all have supported the City's position. *Georgia Outdoor Advertising, Inc., v. City of Waynesville*, No. A-C-86-52 (W.D.N.C. Nov. 14, 1986) and *Primary Media Corp. v. City of Orlando*, No. 86-116-Civ-Orl (M.D. Fla. filed Mar. 7, 1986). In addition, the parties in *National Advertising Co. v. City of Pompano*, No. 86-6466 Civ-Paine (S.D. Fla. filed Apr. 29, 1986) have agreed to a consent decree which provides for a five (5) year removal period for nonconforming billboards. As has been noted infra *French v. City of Appleton*, No. 86 CV 231 (Cir. Ct. Outagamie Co., Sept. 5, 1986) invalidated a city ordinance but was decided on independent state grounds.

contractual rights regarding an estate in land recognized in Pennsylvania and called the subsistence estate. The Raleigh ordinance permits the unfettered use of Petitioner's real property interests for any use allowed in the Industrial-I and Industrial-II zoning classifications. The Industrial classifications are the most liberal in Raleigh and allow any use allowed in the City. App., infra 1a-4a. Certainly allowing such a wide utilization of the property cannot be considered confiscatory. Any restrictions on other uses of the property leased to Naegele is placed thereon by the lessor, not the City of Raleigh.

2. *FCC v. Florida Power Corp.*, No. 85-1658, prob. juris. noted, 160 S. Ct. 2273 (June 2, 1986) (argued Dec. 3, 1986). This case involves the interpretation of a federal statute as it relates to a regulated industry and, more particularly, the actual physical invasion and occupation of the utilities property (its poles). Again, contrast with the Raleigh situation where no physical occupation of Naegele's property occurs.

3. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. 85-1199, prob. juris. noted, 106 S. Ct. 3292 (June 30, 1986) (to be argued in January, 1987). This case involves a county ordinance which severely limits the activities a property owner can undertake on its property. Contrast with Raleigh's ordinance which will allow billboards on some of Naegele's property and any other legal use on all of Naegele's property. How can almost total ability to use one's property be compared to the situation in *First English*?

4. *Nollan v. California Coastal Comm'n.*, No. 86-133, prob. juris., noted, 107 S. Ct. 312 (Oct. 20, 1986) (to be argued February, 1987). *Nollan* involves the actual physical invasion and occupation of approximately one third of the property owner's beachfront property, whereas Raleigh's ordinance causes no physical occupation of Naegele's land and no possession of its personal property.

CONCLUSION

The United States Supreme Court should not use its discretion to hear this case. The Court should refuse to exercise its discretion on the following grounds:

1. The Raleigh ordinance is neither a complete nor even a partial ban on billboards. Raleigh's ordinance continues to allow the erection of billboards and on-premise signs with no attempt to control the message content of the signs. Every ordinance regulating or prohibiting the display of billboards is unique. The Raleigh ordinance cannot be a good case to establish precedent for other areas of the country because every ordinance and every fact situation are different.
2. Naegele should not be allowed to escape the consequences of its failure to present any evidence pursuant to its duty under Rule 56 as to the reasonableness of the amortization period. If any evidence exists as to the reasonableness of the period, Naegele has waived any opportunity for the chance to present it.
3. The concept of amortization cannot be questioned. There may or may not exist valid questions as to the length of amortization periods but surely any

governmental body, including the federal government in the original Highway Beautification Act, has the right to bring the operation of nonconforming uses to a halt after some reasonable period of time. To deny otherwise would be to penalize the public and assure the continuation of uses that changing needs, mores and sentiments may deem no longer appropriate.

4. Naegele has lost none of its property. No taking has occurred. Any area in which billboards are now prohibited may still be used for any other use legal under the Raleigh zoning code. Billboards may still be erected in some zoning classifications. Naegele has escape clauses in its leases with property owners which allow Naegele to walk away with no further obligation in the event that governmental regulation prohibits the further display of Naegele's signs at a particular site. C.A. App. 368. Raleigh is only one of fifty-two cities and towns in which Naegele operates. Any nonconforming signs may be moved to another jurisdiction and, in many cases, replaced with a new, conforming sign. Therefore, what property has been taken?

5. The four pending Takings Clause cases bear absolutely no factual relationship to the Naegele case and therefore no constructive guidance could be found by delaying decision on this petition pending resolution of those cases. In short, at the end of the 5 1/2 year amortization period, the company may still operate a sign business displaying exactly the same type of signs; only smaller and spaced a wider distance apart. Such results cannot constitute a taking as envisioned by the U.S. Constitution's Fifth Amendment.

6. There exists no conflict in the decisions of either the Federal Courts of Appeal or the Federal District Courts or the Supreme Court itself regarding the amortization question. Such state court decisions that deny amortization generally do so on an independent state basis.

Respondent respectfully requests the Court to deny the petition.

This the 16 day of January, 1987.

CITY OF RALEIGH, NORTH CAROLINA

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APPENDIX

APPENDIX A

RALEIGH CITY CODE

Sec. 10-2046. Industrial I district; use regulations.

In an industrial I district, no use of land or building shall be excluded except the following:

(a) The manufacture of:

(1) Acetylene gas.

(2) Acid.

(3) Ammonia.

(4) Bleaching powder.

(5) Chlorine.

(6) Superphosphate and other phosphate.

(7) Nitrogenous tankage, fish meal, or any fertilizer materials carrying an objectionable odor.

(8) Fertilizer or any other product involving the use of dusty or granular ingredients, unless the manufacturing process and the transfer of the ingredients is carried on under cover or is so screened that the emanation of dust beyond the industrial district is prohibited.

(9) Fireworks or explosives.

(10) Turpentine.

(11) Oil refining, petroleum distillation (excluding oil recycling facilities), hot asphalt plants (excluding bituminous concrete facilities).

(12) Paints, varnish, or shellac which requires distillation or heating of ingredients.

(13) Soap manufactured from animal fats but not from vegetable or mineral oils.

(14) Vinegar.

(b) (1) Storage yard for wrecked, dismantled or partially dismantled automotive vehicles except when approved by the board of adjustment upon findings of fact indicating that:

a. The area is enclosed by a fence.
b. The yard is operated by someone engaged in the wrecker or towing business.
c. The yard is screened by natural objects, plantings, fences or other appropriate means so as not to be visible at any season of the year from any adjacent public street right-of-way or any adjacent property not zoned for industrial use.
d. The yard is used exclusively for vehicle storage and that no parts from stored vehicles are sold at wholesale or retail.

(2) Junkyard or shop for purchase, sale, handling, baling or storage of scrap paper, scrap metals, scrap rubber, broken bottles, or rags, where in the conduct of which establishment these materials are on the premises, except where:

a. The waste consists of scrap metals from industrial plants, created by stamping, punching, milling, lathing, screw machinery, or like manufacturing process, but not by the wear or deterioration of finished products;
b. Storage of materials is in enclosed buildings;
c. The scrap materials are transported in containers, cartons, or enclosed vehicles.

(3) Any use or trade, which, though properly and safely operated with ordinary care, according to good and reasonable practice, causes noxious or offensive odors, gas, fumes, smoke, dust or vibration or noise which substantially interferes with other uses of property permitted in the district; provided that

nothing in this section shall be construed to exclude from this district any of the following:

a. Railroads and their:
   Tracks
   Yards
   Terminals
   Shops
   Roundhouses
   Accessories and appurtenances
b. Public utilities and their:
   Power plants
   Electric substations
   Transformers
   Gas plants
   Gas holders
   Sewage disposal plant
   Pumping stations
   Water supply installations
   Water tower, tanks
   Reservoirs
   Filtration or other water purification facilities
   Transportation facilities
   Shops
   Accessories and appurtenances
   Incinerators

(4) Dwellings or residences of any type except:

a. The residence of a caretaker or watchman; or
b. An alteration to an existing dwelling which changes the dwelling without adding another family unit.

(5) Signs prohibited in section 10-2065.5, and signed which do not conform to either 10-2065 et seq. or 10-2066 et seq.

(6) Unless expressly provided otherwise, the standards for special use exceptions such as 10-2073(c)(15),

and the standards for conditional use exceptions, such as 10-2033(h), are applicable in industrial zoning districts.

(c) Nothing in this section shall be construed to regulate or to exclude from an industrial I district a publicly owned sanitary landfill site or sites devoted to the following uses among other:

(1) The disposal of solid waste pursuant to all applicable state and local standards and regulations.

(2) The incidental and accessor reclamation of solid waste by a public or private agency.

Sec. 10-2047. Industrial II district; permitted uses.

The use regulations in an industrial II district are the same as the use regulations in an industrial I district. The only difference between the two (2) districts is the minimum yard space requirements established by section 10-2063 of the Code.

APPENDIX B

RALEIGH CITY CODE

Sec. 10-2065.6 Nonconforming signs.

(a) Within ninety (90) days after the effective date of this chapter:

(1) Any existing nongovernmental flashing sign shall stop flashing;

(2) Any portable sign, banner or windblown sign not authorized by section 10-2065.2(g)(1) shall be removed;

(3) Any existing sign which mechanically moves shall cease its movement;

(4) Any message, copy of announcement which uses a series of two (2) or more signs following one another placed parallel to a street or highway carrying a single message, copy, or announcement part of which is contained on each sign shall terminate.

(b) Nothing in this chapter shall prevent the ordinary maintenance repair of a nonconforming sign or replacement of a broken part of a nonconforming sign. Whenever any nonconforming sign, or part thereof is altered, replaced, converted or changed, the entire sign must immediately comply with the provisions of this Code.

(c) Nonconforming signs which are destroyed or damaged by fifty (50) percent or more of their value shall not be rebuilt or repaired except in conformance with this Code.

APPENDIX C

RALEIGH CITY CODE

Sec. 10-2066.2 Specific outdoor advertising sign regulations.

Outdoor advertising signs and structures which comply with the provisions of this Code are permitted in any industrial zoning district provided the specific sign location is four hundred (400) feet or more from any zoning district which allows any dwelling unit.

MOTION FILED
JAN 20 1987

No. 86-981

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a
NAEGELE OUTDOOR ADVERTISING CO.
OF RALEIGH-DURHAM,
Petitioner

v.

CITY OF RALEIGH,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF NORTH CAROLINA RESTAURANT ASSOCIATION AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Dated: January 20, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE OF NORTH CAROLINA RESTAURANT ASSOCIATION

INTEREST OF THE AMICUS CURIAE

The North Carolina Restaurant Association respectively moves for leave to file the attached brief as amicus curiae in this case in support of the Petitioner. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the North Carolina Restaurant Association in this case is that it is a private, non-profit trade association whose membership is comprised of in-

dividuals and businesses involved in all aspects of North Carolina's food service industry and includes the operators of over 4,000 restaurants located in the state. The restaurant members of the North Carolina Restaurant Association rely heavily on outdoor advertising signs and billboards to promote their businesses. Many of these signs and billboards are owned by the restaurants and constitute substantial investments of those establishments. The North Carolina Restaurant Association and its members have a direct interest in the issue before the Court in this case, namely, whether an ordinance such as the City of Raleigh billboard ordinance in question which will require the destruction of existing and lawfully erected outdoor advertising billboards and signs and provide as compensation nothing more than a 5½ year grace period within which to accomplish such destruction, constitutes a taking of property without just compensation or a denial of due process in violation of the Fifth and Fourteenth Amendments.

The amicus curiae brief which the North Carolina Restaurant Association is requesting permission to file will point out and stress the impact of such an ordinance on the restaurant industry and the importance of having the legal issue involved finally determined by this Court.

Respectfully submitted this 20th day of January, 1987.

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BRIEF AS AMICUS CURIAE OF THE NORTH CAROLINA RESTAURANT ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The North Carolina Restaurant Association (NCRA) is a private, non-profit trade association dedicated to protecting and promoting the $4 billion North Carolina commercial food service industry. The 1,000-plus members of the NCRA are comprised of individuals and businesses at all levels of North Carolina's food service industry and include the operators of over 4,000 restaurants located in the State. Tens of thousands of people are employed in North Carolina restaurants, and the health and vitality of the restaurant industry is critical

to the continued economic and social growth of North Carolina.

NCRA members rely heavily on outdoor advertising to promote their businesses and to make the public aware of the many options available to restaurant patrons in North Carolina. The restaurant business is highly competitive, and for many restaurants, especially smaller roadside operations which must compete with large regional and national fast-food and family-style restaurant chains, outdoor advertising is crucial to survival. Thus, many restaurant owners have made and continue to make substantial investments in outdoor advertising signs and billboards. The NCRA and its members are concerned about the growing efforts of local government authorities in North Carolina (and elsewhere) to force the uncompensated removal of lawfully erected signs and billboards and about the serious commercial injuries that such ordinances inflict on the owners of restaurants and other businesses.

SUMMARY OF ARGUMENT

The just compensation and due process protections of the Fifth and Fourteenth Amendments prohibit government authorities from effectively confiscating the property of a private enterprise without paying just compensation to the property owner. Restaurant owners in North Carolina (and throughout the United States) have made substantial investments in, and depend greatly on, outdoor advertising signs and billboards. Municipal ordinances such as the Raleigh sign ordinance deprive restaurant owners of these investments without just compensation, and threaten smaller businesses with extinction in the intensely competitive restaurant industry.

Moreover, while the Petition does not squarely present a First Amendment question for the Court's consideration, we believe that the patent and serious First Amendment implications of the Raleigh ordinance weigh heavily in favor of requiring the city to scrupulously abide by

the just compensation and due process provisions of the Constitution. For many NCRA members, the proliferation of local ordinances similar to the Raleigh ordinance not only forecloses one avenue of commercial speech, but also makes it impracticable for those members to advertise at all. Outdoor advertising is often the sole effective way for many restaurants to advertise. When the ability of businesses to advertise is eliminated or unduly restricted, the demise of those businesses is likely to follow.

ARGUMENT

THE OWNERS OF OUTDOOR ADVERTISING STRUCTURES SHOULD NOT BE DEPRIVED OF THEIR SUBSTANTIAL AND IMPORTANT INVESTMENTS IN THOSE STRUCTURES WITHOUT JUST COMPENSATION

1. There is no question that outdoor advertising is crucial to the survival of many businesses in the United States. "Many businesses . . . rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (plurality opinion). The importance of advertising to a restaurant's success is reflected by the substantial advertising expenditures of members of the NCRA. The NCRA estimates that 2-5% of gross restaurant receipts are spent on advertising—a figure which in North Carolina alone represents tens of millions of dollars. Restaurants are substantial users of on-premises and off-premises billboards, both as renters of billboard space and as billboard owners.

The Raleigh sign ordinance does not offer just compensation to owners of nonconforming signs. Instead, the city simply permits a five year grace or "amortization" period in which nonconforming signs and billboards may be left standing. Other municipalities in North Carolina have similar sign ordinance amortization provisions.

Durham City Code, Sec. 24-14(x); Greenville City Code, Sec. 32-109.5.B; Salisbury Zoning Ordinance, Sec. 8A-10 (5); Winston-Salem City Code, Sec. 25-12(f). The amortization period does not compensate sign owners for losses incurred when signs with long-remaining useful lives are torn down. Even assuming that legitimate governmental goals are served by the reasonable regulation of outdoor advertising structures, the just compensation and due process protections of the Fifth and Fourteenth Amendments prohibit governmental authorities from forcing private parties to carry the entire cost of accomplishing those public goals. *See Connolly v. PBGC*, 106 S. Ct. 1018, 1027 (1986), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (just compensation clause bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

While some restaurants employ several media to advertise, many of NCRA's members cannot afford to make regular use of radio, television or newspaper advertisements. Electronic advertising requires sophisticated market analyses, and constant, repeated expenditures in order to be effective. Because an average of 23% of the restaurant dollar comes from travelers and tourists (and because some restaurants derive up to 95% of their business from travelers and tourists), roadside advertising is especially important. Accordingly, billboard advertisements make up the bulk of many independent restaurant's advertising programs, and restaurants which cater to travelers often find that other advertising methods are not feasible. Newspaper ads, for example, do not reach the traveler when he or she is most likely to respond to a restaurant advertisement, i.e., when the traveler is on the road and hungry.

Exterior restaurants signs are perhaps the most crucial part of a restaurant's marketing program. Many

of these signs cost thousands of dollars to erect and constitute substantial investments by businesses in the historically low profit margin restaurant business. Specifically, many restaurants have profit margins of 10% or less of gross sales. When such a restaurant is required to replace a sign at a cost of $10,000, theoretically, that establishment must increase sales volume by $100,000 in order to pay for the sign and break even. However, in many such instances there is no extra $100,000 in sales volume available to the establishment in question and the result is a substantial loss to the restaurant operator. This also helps to explain the high morality rate of the restaurant industry. As the Petition points out (pp. 20-24), there is "substantial confusion and uncertainty" in the lower courts "concerning the removal, without compensation, of billboards or other structures or uses made nonconforming by a land use regulation." Although Petitioner's challenge to the Raleigh sign ordinance involves a challenge to "off-premise" sign regulation, the rationale of many lower court opinions may well be applied with equal force to on-premise advertising. Indeed, Raleigh itself previously considered but rejected a plan providing for the "amortization" of on-premise signs and billboards (Petition at 4) and might reconsider the matter in light of the two lower court opinions upholding the Raleigh ordinance. NCRA members are concerned about the safety of on-premise sign and billboard investments so long as it is unclear whether those investments may be confiscated by any of the hundreds of municipal governments in North Carolina under similar ordinances. The Court should accept the Petition and lay these uncertainties to rest.

2. The NCRA also believes that the right of its members to employ outdoor advertising signs and billboards to attract customers raises serious free speech concerns. While we recognize that the Petition does not squarely present a First Amendment issue for the Court to resolve, the unmistakable impact of Raleigh-type sign or-

dinances is that many businesses will be entirely precluded from engaging in effective commercial speech. The free speech implications of such municipal regulation make it imperative that municipalities strictly adhere to the Fifth and Fourteenth Amendments by paying for advertising property taken from private businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FILED
JAN 20 1987

No. 86-981 (4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,
Petitioner,

v.

CITY OF RALEIGH,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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MOTION OF OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1986

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MOTION OF OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Outdoor Advertising Association of America, Inc. (OAAA), by its attorneys, respectfully moves, pursuant to Rule 36.1, for leave to file a brief as amicus curiae supporting the petition for a writ of certiorari of Major Media of the Southeast, Inc. ("Naegele"). While the Petitioner Naegele has consented to the filing of a brief of OAAA as amicus curiae, the Respondent City of Raleigh has refused consent.

In support of this motion, the OAAA states the following:

1. The OAAA is the primary trade association of the standardized outdoor advertising industry. The OAAA's members range in size from small, locally-based businesses to businesses which operate on a regional and national basis. OAAA's members collectively maintain approximately 250,000 outdoor advertising signs. The Petitioner is a member of OAAA.

2. The constitutional issues raised by the Petitioner have an impact far beyond the interests of the Petitioner Naegele and the Respondent City of Raleigh. In particular, the question of whether a governmental body constitutionally can use the fiction of "amortization" to avoid paying just compensation where it requires the destruction of outdoor advertising sign structures materially and substantially affects the property, civil rights and economic livelihoods of all of OAAA's members.

3. Because the OAAA represents the interests of a large and diverse group of outdoor advertising sign owners, its brief provides a perspective on the issues which is different from that of either the Petitioner or of the Respondent. In addition, the brief proffered by OAAA as amicus curiae provides relevant factual information regarding the physical permanence, immobility and fair market value of outdoor advertising sign structures which was not presented to this Court by the Petitioner and which, in all likelihood, the Respondent will not present.

4. OAAA and its counsel are unaware of any legitimate reason for the refusal of the Respondent City of Raleigh to consent to the filing of OAAA's brief

as amicus curiae. OAAA notes, however, that the Respondent also opposed acceptance of a brief of OAAA as amicus curiae, which supported the position of Petitioner Naegele, proffered by OAAA to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals accepted OAAA's brief as amicus curiae despite the opposition of the Respondent.

The desirability of acceptance of the brief of OAAA as amicus curiae in support of the petition for a writ of certiorari having been shown, OAAA respectfully moves this Court for leave to file the attached Brief as Amicus Curiae of the Outdoor Advertising Association of America, Inc. in Support of the Petition for a Writ of Certiorari.

Respectfully submitted,

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January 20, 1987

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF FOR THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Outdoor Advertising Association of America, Inc. (OAAA) is the trade association of the standardized outdoor advertising industry and represents a majority of the outdoor advertising companies in the United States. OAAA members maintain approximately 250,000 outdoor advertising signs in approximately 7,900 distinct local geographical areas throughout the United States. Seven OAAA member-

companies, including the Petitioner, maintain operations within the State of North Carolina. The Association's membership is extremely diverse and includes both large, integrated national media companies and small, locally based family-owned businesses which typically provide services to one or more market areas within a particular state.

The membership of the OAAA has a vital interest in the instant case. The central issue before the Court is whether a municipality may employ its police power to expropriate one hundred seventy-four lawfully erected outdoor advertising signs and destroy an investment valued in excess of $3 million, without payment of just compensation, based on the fiction that a delay in the date of that expropriation (i.e., "amortization") negates that loss. The Court of Appeals' approval of the principle of "amortization" poses an immediate and direct threat to the multi-billion dollar capital investment of the outdoor advertising industry nation-wide. Indeed, the Circuit Court's decision casts a broad shadow of uncertainty over virtually every decision to commit investment capital to the construction or acquisition of any structure on real property.

The Court's disposition of this Petition will have an immediate impact on the continued existence of the outdoor advertising medium in North Carolina. A number of counties and cities within the State of North Carolina already have enacted laws that mirror the "amortization" provisions of the Raleigh ordinance. Several of these ordinances are currently the subject of litigation pending in the North Carolina courts. Municipal ordinances similar to the Raleigh ordinance also are under consideration or have been enacted in every other state within the Fourth Cir-

cuit. The Court's disposition of this Petition will determine directly the validity of all of these ordinances.

The implications of this case are equally decisive for the continued viability of outdoor advertising companies throughout the United States. As in Raleigh, lawfully erected outdoor advertising sign structures are located nationwide with other compatible land uses within commercial and industrial zones. Nevertheless, outdoor advertising is regularly subject to efforts aimed at its suppression. Local ordinances seeking to compel the removal of lawfully erected outdoor advertising structures have been enacted by municipalities in virtually every state.

A legal system which countenances the forced destruction of lawfully erected outdoor advertising sign structures without the payment of just compensation for the resultant loss of millions of dollars of investment destroys the foundation upon which the outdoor advertising industry's financial structure is based. Indeed, the implications of the Fourth Circuit's approval of "amortization" extend well beyond the outdoor advertising industry, since there is no logical basis for distinguishing outdoor advertising sign structures from all other property subject to land use controls. If the Circuit Court's rationale is not rejected, local governments could compel the destruction of property, without the payment of any compensation, just so long as they wait a "reasonable" time before taking the property from its owner.

SUMMARY OF ARGUMENT

Outdoor advertising sign structures are valuable assets which are a principal means of communication of commercial and noncommercial information. Cap-

ital investment in the outdoor advertising industry nationwide is estimated at several billion dollars. Like many other structures, outdoor advertising signs themselves are complex in design, expensive to construct and typically are reduced to the scrap value of their components if removed from the site on which they are erected.

The Raleigh Ordinance would require the destruction of one hundred seventy-four of the Petitioner's outdoor advertising signs without any payment of compensation for the virtually total loss of the substantial capital investment in those sign structures. Raleigh purports to avoid the payment of just compensation for the required destruction of the Petitioner's property by permitting the structures to continue in existence for five and one-half years after passage of the ordinance requiring their destruction. Raleigh's use of such an "amortization" period was held by the courts below to free Raleigh from any obligation to pay the Petitioner just compensation. This so-called "amortization" scheme totally undercuts the Fifth Amendment's requirement that a government pay just compensation when it deprives an owner of virtually all economic benefit from its property.

In approving the Raleigh "amortization" scheme, the Fourth Circuit failed to articulate a clear constitutional basis for its decision. In addition, the Fourth Circuit confused the accounting concept of "amortization" with business reality when it found that "amortization" over a "reasonable" period of time negated the need for additional compensation to an owner deprived of its property by government action. Finally, the Fourth Circuit found that there is no taking

at all when an "amortization" period was sufficient to permit the owner to "recoup" its investment in property slated for destruction pursuant to government requirement.

The degree to which the "amortization" scheme approved by the Fourth Circuit threatens to undercut the constitutional requirement of monetary payment of just compensation when government takes property in and of itself is a substantial reason why this Court should grant this Petition. The need for review by this Court is heightened by the failure of the Fourth Circuit to articulate a clear and reasonable constitutional basis for approval of the Raleigh "amortization" scheme.

ARGUMENT

I. OUTDOOR ADVERTISING IS A MEDIUM OF COMMUNICATION INVOLVING MAJOR CAPITAL INVESTMENT PREDICATED UPON THE CONSTITUTIONAL PROTECTIONS AFFORDED TO PRIVATE PROPERTY

A. Outdoor Advertising Is A Major Medium Of Communication With A Market Value Comparable To Broadcast and Newspaper Properties

Outdoor advertising has been a principal means for the public dissemination of commercial and noncommercial information in the United States since the inception of this country. *See*, Davidson, *Propaganda and the American Revolution* (1941); Gallo, *The Poster in History* (1972); Houch, *Outdoor Advertising: History and Regulations* (1969) ch. 2. The outdoor medium remains a primary channel for communication despite strong competitive pressure from other media.

The reasons outdoor advertising has retained its significance have a direct bearing on this case.

Most of the principal communications media, including television, radio, direct mail, newspapers and magazines, are classified as "in-home" media because they primarily reach their audience in the privacy of the home or workplace. By contrast, outdoor advertising is an "out-of-home" medium because it is predicated on the dissemination of information in a public forum. *Advertising Age*, "Out-of-Home Media Supplement," Mar. 10, 1980. As a result, outdoor advertising quantitatively expands the spectrum of opportunities for the dissemination of information beyond those afforded by the other media.

Outdoor advertising often is used in conjunction with other media to extend the potential for exposure of a particular message. But outdoor advertising often supplants the in-home media because, like every medium, it has certain distinct capabilities and characteristics that make it uniquely suited for certain messages. For example, the fixed print and pictorial copy on a billboard evokes cognition in a different manner than the communication achieved through the broadcast media. The simple declaratory statement "Buckle Your Seat Belts" would command little attention when disseminated by television. But the same message carries substantial impact when it appears alone on a billboard. Likewise, this simple printed statement would not have the same impact when commingled with other copy in a newspaper because of the unique characteristics of that medium. See, Schwartz, *The Responsive Chord* (1974).

As a result of these factors, the market value of outdoor advertising companies, like broadcast prop-

erties and newspapers, far exceeds the book value of their assets. Capital investment in the outdoor advertising industry nationwide is estimated at several billion dollars. Recently the assets of one company operating on a nationwide basis were acquired for $870 million.

B. An Outdoor Advertising Sign Structure Typically Cannot Be Removed Without Destroying Virtually All of Its Value

To the casual observer, it may appear that outdoor advertising sign structures are portable or can be moved with relative ease. In fact, this is not the case. Outdoor advertising sign structures are costly to construct and are based on extremely complex engineering designs which must sustain the enormous stress exerted on a flat sign surface of between 288 and 672 square feet. A standard 14' x 48' structure utilizes the same amount of steel as a substantial 60' x 100' metal building and costs from $20,000 to $60,000 to construct on-site. When complete, the sign structure itself weighs 15 tons and typically is supported by a foundation composed of 40 cubic yards of concrete which is 25 feet deep and weighs an additional 130 tons.

Smaller 12' x 25' poster panel structures weigh three tons and cost between $6,000 and $20,000 to construct on-site. A poster panel structure also is supported by a substantial concrete foundation which varies in design based on the requirements of the site.

Like most other structures, once an outdoor advertising sign structure is erected, it cannot be disassembled without literally tearing the structure apart. The remnants typically only have scrap value.

The Raleigh ordinance would compel the Petitioner, under threat of criminal penalty, to remove one hundred seventy-four such lawfully erected outdoor advertising signs without any compensation for even the capital investment which they represent. Amicus OAAA simply is unable to comprehend as a practical matter how the Petitioner is compensated for its commitment of capital and commensurate investment expectation that supported the construction of those structures through Raleigh's "amortization" scheme. A delayed taking of property is no less a taking of property than governmental action which eliminates such property immediately.

II. THE ISSUE OF WHETHER "AMORTIZATION" SATISFIES THE REQUIREMENTS OF THE TAKING CLAUSE IS CENTRAL TO THE COURT'S CURRENT EVALUATION OF THE FIFTH AMENDMENT

The decision of the United States Court of Appeals for the Fourth Circuit, which is the subject of the Petition, demonstrates that the court below never grasped the constitutional significance of Raleigh's "amortization" scheme. On the one hand, the Fourth Circuit appeared to find that a five and one-half year "amortization" period which permitted the Petitioner to "recoup" at least part of its investment was sufficient compensation for a taking of the Petitioner's sign structures. But the decision of the Fourth Circuit also appeared to find that since the Raleigh ordinance allowed the Petitioner to keep its sign structures for five and one-half years before their required destruction, there was no taking at all. Regardless of which course is followed, the notion that "amortization" is a remedy which either negates a taking or alterna-

tively satisfies the compensation requirement of the Fifth Amendment is central to the evaluation of the Taking Clause presently being undertaken by this Court. If left undisturbed, the Fourth Circuit's endorsement of "amortization" would provide governments with a simple way to evade the requirements of the Fifth Amendment.

A. "Amortization" Is An Accounting Fiction Which Bears No Relationship To Actual Economic Loss Resulting From A Governmental Taking

The Fourth Circuit's approval of Raleigh's "amortization" scheme hinged in part on its conclusion that, since the five and one-half year "amortization" period permitted Petitioner to "recoup" at least a portion of its investment before Raleigh required the destruction of Petitioner's outdoor advertising sign structures, no "additional compensation" was necessary. *Appendix to Petition* at 8a. The fundamental defect in the Fourth Circuit's approval of Raleigh's "amortization" scheme is that it confuses the accounting concept of "amortization" with business reality.

"Amortization" or "depreciation" is nothing more than an accounting fiction used to allocate the cost of an asset over a period of years. However, the widespread acceptance of this notion for accounting purposes does not carry over to circumstances where the actual loss of an asset is involved. No one familiar with accounting would conclude that a capital item still in use which has been fully depreciated on a company's books necessarily has a fair market value of zero. For example, applying conservative accounting principles, the cost of a building may be amortized over 30 years. Yet a building erected in 1956 which still is in use today in all likelihood will have a fair

market value that may actually be higher than its acquisition cost or cost of construction in 1956.

This Court has made it clear on many occasions that where property has been taken, the standard measure of compensation is the fair market value at the time of the taking. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979), *United States v. Miller*, 317 U.S. 369 (1943), *reh. denied*, 318 U.S. 798 (1943), *City of New York v. Sage*, 239 U.S. 57, 61 (1915). The fact that the owner of property may have held the property for many years, may have recouped its investment many times over, or that the property may have been depreciated to zero simply never enters into the decision of the fair market value. The only relevant issue is the property's fair market value at the time its beneficial use was extinguished by government action. Despite this fact, the Fourth Circuit adopted the perverse view that the Petitioner will be compensated for the taking of all or part of its investment solely through the realization of gross revenues which it would have received in any event. Under this reasoning, government would never have to pay monetary compensation in the event of a taking if it could delay the taking a "reasonable" time.

B. "Amortization" Is A Taking Of Property Without Payment Of Just Compensation

The outdoor advertising sign structures at issue in this case were constructed in commercial and industrial areas in compliance with all land use regulations and the building codes applicable at the time they were erected. Those regulations were predicated on Raleigh's subjective perception at that time that billboards were a compatible use within commercial and industrial zones. In 1983 Raleigh changed that policy

with the enactment of Ordinance No. (1983) 210 TC 198. This is not any different than the circumstances of a manufacturing plant located in an older commercial district that became "gentrified" and subsequently was zoned for residential use. In both instances a once lawful use is declared nonconforming. But OAAA doubts that Raleigh would seriously contend to this Court that it could exercise its police power to require the destruction of that factory building after the expiration of a "grace period" of several years and escape the constitutional requirement to pay just compensation to the building's owner.

The courts below have pushed the distinction between a police power regulation and condemnation too far in this instance. The core premise for a valid exercise of the police power which does not give rise to Fifth Amendment rights is that the owner of the affected property has not been stripped of all economic benefit from its use. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 455, 459 (1985). An ordinance which seeks to substitute ordinary revenue from a capital asset for the payment by the government of compensation simply has not provided the owner with anything of economic value which was not part of the owner's initial expectation. Such an ordinance proposes nothing more than an economic "shell game" in which the owner of property essentially pays himself, rather than receiving payment from the government for the destruction of his property for some ostensible public purpose. Such a scheme conflicts directly with the decisions of this Court which repeatedly have held that the just compensation requirement of the Fifth Amendment in-

cludes the requirement of a payment to the owner of the full monetary equivalent of the property. *United States v. Miller, Almota Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470 (1973).

The Raleigh ordinance does not merely diminish the value of the Petitioner's property and permit some reasonable alternative use. It destroys virtually all such value and deprives the owner of all reasonable use. The so-called "amortization" scheme implemented by the Raleigh ordinance completely undercuts the legal and constitutional framework which assures that the commitment of capital investment in property may be made with confidence that the government subsequently will not seize or destroy that property without payment of just compensation.

C. A Taking Occurring After A Period Of Years Still Is A Taking

The Fourth Circuit also concluded that, where an owner is deprived of property by the government over a period of years sufficient for the owner to "recoup" his or her investment, there is no taking at all. *Appendix to Petition* at 9a-10a.

Under the Fourth Circuit's analysis, if a government condemns property, but permits the owner of the property to continue to use it for a "reasonable" period of years until the government takes actual possession, the government need not pay the owner because there has been no taking. There clearly is no constitutional basis for the concept that a delayed taking of private property somehow ceases to be a taking. Indeed, there are many inverse condemnation cases where governmental actions occurring over a

period of years have been found cumulatively to be a taking necessitating the payment of just compensation. *United States v. Causby*, 328 U.S. 256 (1946), *Foster v. United States*, 607 F.2d 943 (Ct. Cl. 1979), *Wilfong v. United States*, 480 F.2d 1326 (Ct. Cl. 1973), *Pete v. United States*, 531 F.2d 1018 (Ct. Cl. 1976).

III. CONCLUSION

There are four cases pending before this Court this term which raise a spectrum of issues regarding the extent to which an exercise of the police power impinges upon rights guaranteed under the Fifth Amendment Taking Clause. Given this circumstance, the reasons for granting the instant petition for a writ of certiorari are particularly compelling. The instant case provides perhaps the clearest factual context of governmental action under the guise of the police power which results in the virtually complete destruction of private property. Moreover, a decision in any of these pending cases that a compensable taking may occur as a result of an exercise of police power would not be meaningful if this Court did not, at the same time, resolve the current conflict in the federal and state courts regarding whether governments may evade the constitutional consequences of a taking simply by affording the owner of the property involved an extension of time before that property is finally expropriated. Given the significance of the issues presented in the instant case, at a minimum the Court should hold the Petition for disposition until after decisions are rendered in the pending cases.

Respectfully submitted,

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January 20, 1987

MOTION FILED
JAN 20 1987

(5)

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IN THE

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OCTOBER TERM, 1986

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ADVERTISING COUNCIL INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-981

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a NAEGEL OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM,

Petitioner

v.

CITY OF RALEIGH,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE ADVERTISING COUNCIL INC. FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Advertising Council Inc. moves this Court for permission to file an Amicus Curiae brief in support of

petitioner. Respondent has declined to consent to the filing of this brief.

The Ad Council Inc. is a private, non-profit organization. In 1985 the Ad Council conducted several dozen public service campaigns and generated mote than $725 million worth of advertising time and space from numerous cooperating print, electronic and display media outlets.

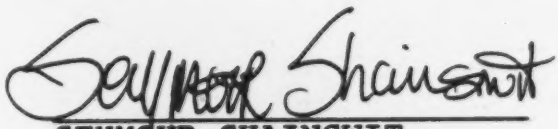
Among the media that regularly display the Ad Council's public service messages are outdoor advertising structures, such as billboards. The Ad Council is greatly concerned about the potential spread of local ordinances, such as that upheld by the court of appeals in this case, which, by eliminating substantial numbers of billboards across the country, would seriously inhibit the Council's ability

to convey its public service announcements. Because the Ad Council is a non-profit organization, we believe its interests are not adequately represented by any other party to this Petition.

For these reasons, the Ad Council respectfully requests permission to file a brief as Amicus Curiae.

January 19, 1987

Respectfully Submitted,



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QUESTION PRESENTED

Whether a municipal ordinance requiring the uncompensated removal of hundreds of billboards used for public service and commercial advertising purposes violates the Due Process or Takings Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

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CITY OF RALEIGH,

Respondent

BRIEF FOR THE ADVERTISING COUNCIL INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Advertising Council Inc. is a private, non-profit organization of thousands of volunteers who conduct public service advertising campaigns on behalf of a number of worthy civic

causes, such as efforts to combat crime, drunk driving, drug and alcohol abuse, and employment discrimination, as well as campaigns sponsored by the United Way. In 1985 the Ad Council conducted several dozen public service campaigns and generated mote than $725 million worth of advertising time and space from numerous cooperating print, electronic and display media outlets.

Among the media that regularly display the Ad Council's public service messages are outdoor advertising structures, such as billboards. For some campaigns, outdoor advertising is a uniquely effective means of spreading the Ad Council's public service message; for many other campaigns, outdoor advertising is an important part of the mix of media used because it is such a cost-efficient means of reaching a large

portion of the community. The Ad Council is greatly concerned about the potential spread of local ordinances, such as that upheld by the court of appeals in this case, which, by eliminating substantial numbers of billboards across the country, would seriously inhibit the Council's ability to convey its public service announcements.

SUMMARY OF ARGUMENT

Outdoor advertising is an important medium of expression that is entitled to protection under the First Amendment. Because outdoor advertising reaches a great number of persons at low cost, there may be no alternative, equally effective channels of communication for many groups attempting to convey their messages to large and

diverse segments of the public. While the Advertising Council is fortunate to receive generous contributions of time and space from electronic and print media, billboards are an integral part of its efforts, in Raleigh and elsewhere, to disseminate its non-commercial public service announcements.

The forced removal of billboards, even for a worthy civic purpose such as scenic improvement, thus raises substantial First Amendment concerns. As a result, it is incumbent upon the courts to ensure that regulations restricting outdoor advertising scrupulously comply with all applicable constitutional requirements. We believe that the Petition convincingly demonstrates that Raleigh's ordinance violates the Fifth Amendment by mandating the destruction of valuable

existing properties without the payment of just compensation.

Although the Fifth Amendment would not prevent Raleigh from eliminating Naegele's billboards, and diminishing the Ad Council's means of expression in the city, so long as it offers just compensation, the facts of this case show that Raleigh would be unlikely to do so if it were put to that choice. By eliminating the need to pay just compensation, however, the court of appeals has relieved Raleigh of the constitutionally-imposed obligation to weigh costs and benefits before taking private property for a public purpose. This ruling thus will encourage other municipalities to order the removal of billboards, to the great detriment of civic and business organizations that depend on outdoor advertising to convey

their messages.

ARGUMENT

OUTDOOR ADVERTISING IS AN IMPORTANT MEDIUM OF COMMUNICATION THAT SHOULD NOT BE ELIMINATED ABSENT STRICT ADHERENCE TO CONSTITUTIONAL REQUIREMENTS

1. This Court stated in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (plurality opinion), that "[b]illboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." See also id. at 524 (Brennan, J., concurring in the judgment) ("[t]he plurality and I agree that billboards are a medium of communication warranting First Amendment protection."). The Court also remarked in Metromedia that billboards are a "unique forum[] of expression" (id. at 500) and that

"[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." Id. at 516 (quoting the parties' Joint Stipulation of Facts No. 28).[1]

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1 See Meiselman, The Regulation of Outdoor Advertising: Balancing Freedom of Speech and Aesthetics, 1985 Annual Survey of American Law 671, 672 (footnotes omitted):

> Billboard regulations that further aesthetic objectives may threaten first amendment interests. Although regulation of the medium itself is constitutionally permissible, the billboard messages remain constitutionally protected speech. The first amendment protects the right to advocate a chosen cause using the most effective means possible, and, if a billboard is the only effective method of communication for a particular message, the elimination of the billboard as a potential medium for that message may infringe on that right. Additionally, the first amendment requires that speech regulation be applied in a nondiscriminatory manner Thus, if a regulation

The experience of The Advertising Council Inc. confirms this Court's observations. Established in 1942, the Ad Council is a private, non-profit organization that conducts public service advertising campaigns designed to increase public awareness of, and thereby to help solve, societal problems. Among the several dozen current campaigns, for example, are "Aid to Higher Education," "Youth Alcoholism Prevention," "United Negro College Fund," "Drunk Driving Prevention," "Forest Fire Prevention," "Help Fight Pollution," and "Participation of Disabled Citizens." See The Advertising Council Inc. 1985-1986 Annual Report 4-

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eliminates the use of relatively inexpensive billboard messages and precludes groups with limited resources from communicating effectively, the regulation may infringe on first amendment freedoms.

19. The Ad Council accomplishes these goals by placing advertisements in media outlets across the country. In 1985, the Ad Council generated more than $725 million worth of advertising time and space from thousands of print, broadcast, and display media outlets. Id. at 22.

For several reasons, outdoor advertising is an essential component of these campaigns. First, as the Court noted in Metromedia, billboards are an extremely inexpensive and cost effective method of conveying a message to large and diverse segments of the community. In addition, billboards offer a form of communication for which there often is no adequate substitute in terms of effectiveness. Take the Ad Council's campaign, begun in 1985, to encourage seatbelt use among drivers. This

campaign focuses heavily upon radio and outdoor advertising, because the message -- "Buckle Your Safety Belt" -- is far more likely to make a lasting impression on people when they are in their automobiles.[2] In sum, as the Ad Council's Vice President has testified, "outdoor advertising is as essential as the test of the communications media in promoting voluntary citizen actions to solve national problems." Testimony of Lewis W. Shollenberger before the Federal Highway Administration, July 10, 1979.

The outdoor advertising indus-

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[2] A Department of Transportation survey in 19 cities, conducted in the first six months of 1986, found that safety belt use by drivers increased from 23% to 34.2% during the period of the Ad Council campaign. See 1985-1986 Annual Report 5. Billboards also play a vital role in the Ad Council's campaign against drunk driving. It is therefore ironic that Raleigh would defend its billboard removal ordinance on the ground of traffic safety. See Pet. App. 20a.

try, including petitioner Naegele, annually donates thousands of billboards, worth many millions of dollars, to promote Ad Council campaigns. In 1985, for example, outdoor companies gave space to display 38,240 signs or messages in support of Ad Council programs. See 1985-1986 Annual Report 23. Petitioner itself obtained nearly 1,500 signs from the Ad Council for display in North Carolina, including 320 for Raleigh.

2. This brief discussion highlights an essential point that the district court and the court of appeals appear to have overlooked: billboards and other forms of outdoor advertising cannot be equated with gravel pits, brickyards, livery stables, or other perceived public "nuisances" that can be eliminated by legislation or moved

elsewhere at no loss to the community. Rather, as the Petition states (Pet. 17 n.9), "[f]ar from posing a threat to the public health, safety, or morals, outdoor advertising serves as an important medium of public expression clothed with protections under the First Amendment." Assuming arguendo, therefore, that billboards create aesthetic problems that warrant some legislative restrictions in the public interest, such restrictions at the same time inhibit the expression and dissemination of valuable information, contrary to the public interest.[3] With the spread of ordinances like Raleigh's

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[3] In contrast to the very real First Amendment rights at stake, aesthetic concerns are, of course, necessarily subjective. See, e.g., The Washington Post, October 8, 1986, p. 43, reporting the results of a nationwide poll showing that 70% of those surveyed stated that billboards were not annoying or unatractive.

requiring that billboards be taken down, organizations such as the Ad Council would find it increasingly difficult to convey their public service messages in an efficient and effective manner.

In light of these concerns, it is essential that the courts ensure that local governments adhere scrupulously to constitutional requirements before ordering the elimination of an important means of communication. In Metromedia, this Court invalidated a San Diego billboard ordinance because it accomplished its purposes in a manner that violated the First Amendment. Here, the Raleigh billboard ordinance requires the removal of a substantial portion of the available outdoor advertising in the city in a manner that runs afoul of the Fifth Amendment. As the Petition explains, Raleigh has

ordered Naegele to tear down 174 billboards -- nearly 40% of the total number of billboards in the city -- without the payment of any compensation for these properties.[4]

The Ad Council fully appreciates that -- putting aside First Amendment issues not presented by the Petition -- Raleigh could

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[4] Although the Raleigh ordinance purports to allow 150 square foot billboards alongside four-lane roads and 75 square foot billboards alongside two-lane roads, these sizes are too small for effective communication with persons in passing automobiles. Perhaps more important, these sizes are far smaller than the standardized poster panels manufactured and distributed for use in outdoor advertising nationwide. See Meiselman, 1985 Annual Survey of American Law at 688 & n.119. It would greatly increase expenses if the Advertising Council had to produce posters in "oddball size[s]" for the Raleigh market (see Donrey Communications Co. v. City of Fayetteville, 280 Ark. 408, 660 S.W.2d 900, 90x (1983), cert. denied, 466 U.S. 959 (1984)); most likely, the Ad Council would simply forgo outdoor advertising in Raleigh.

constitutionally eliminate Naegele's billboards, and thus irreparably damage the Council's expressive interests in the city, simply by offering just compensation for the billboards and accompanying leaseholds. See Berman v. Parker, 348 U.S. 26, 36 (1984) (city has authority to condemn private property for aesthetic purposes, and the "rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."). But that, at least, would put municipalities to the difficult choice of leaving these First Amendment facilities intact or paying for their destruction. As this case plainly demonstrates, many localities (including Raleigh), if given that choice, would not demand that outdoor advertising structures be taken down.[5]

By making the taking cost-free, however, the court of appeals' ruling instead tips the scales heavily in favor of necessarily subjective aesthetic considerations and against First Amendment considerations and thus substantially skews local governments' decision-making processes.

As a result, the decision below removes the constitutionally-mandated disincentive to the taking of private property and encourages

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[5] As the Petition explains (Pet. 5 n.2), North Carolina law provides that localities must pay just compensation for the forced removal of outdoor advertising signs alongside federally aided highways. In view of this state-imposed requirement, Raleigh chose to live with the alleged aesthetic and traffic safety problems caused by Naegele's 170 billboards adjacent to federally-aided highways rather than compensate Naegele for their removal. See Pet. App. 32a ("[a]ll conforming outdoor advertising signs shall be discontinued or made conforming * * * unless explicitly prohibited by state statute.").

municipalities to order widescale removal of outdoor advertising. The impact of such removals will fall heavily on the Ad Council and other civic, political, and business organizations that depend on billboards to convey their messages. This disturbing development, which threatens First as well as Fifth Amendment values, raises important issues that warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY, 1987

Supreme Court, U.S.
FILED
FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-981

In the Supreme Court of the United States

OCTOBER TERM, 1986

MAJOR MEDIA OF THE SOUTHEAST, INC., d/b/a NAEGELE OUTDOOR ADVERTISING CO. OF RALEIGH-DURHAM, PETITIONER

v.

CITY OF RALEIGH, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONER

The Petition presents a question regarding municipal zoning power that is of fundamental importance to businesses and governments across the nation: whether a local ordinance that declares certain uses of land unlawful and requires the removal of existing, economically valuable nonconforming structures (here, outdoor advertising signs) within a period of time well short of the actual useful life of the structures constitutes a taking of property for which the Fifth and Fourteenth Amendments require payment of just compensation. Raleigh's response fails to address the constitutional question presented in any meaningful way and rests upon a series of misconceptions about the nature of the issue presented.

1. The Brief in Opposition largely ignores the important questions of constitutional doctrine presented by this case. This Court recognized more than 60 years ago in *Pennsylvania Coal*, and has confirmed on several recent

occasions, that the just compensation requirement of the Takings Clause can be triggered by governmental regulation that goes "too far" in diminishing or destroying economically viable uses of property. See Pet. 11-13. How far is "too far" is a question this Court has sought to address in numerous recent cases; but it has made little progress in resolving the issue because of procedural infirmities in the cases accepted for review, which, from *Agins* to *Yolo County*, have repeatedly been found to lack requisite finality or ripeness.

The instant case does not have the procedural flaws of the earlier cases [1] and is also an excellent complement to those presently pending. While the other recent and pending cases address the issue of regulatory takings principally in the context of regulations that affect *planned or potential future uses* of property, this case adds the further dimension of the power of government, as part of the zoning process, to force discontinuation of *existing and previously lawful uses* of property without payment of compensation.

Respondent seeks to justify its ordinance by pointing to the fact that forced removal of Naegele's lawfully erected signs is deferred for an "amortization" period, but its reliance upon the "amortization" concept is not accompanied by any explanation of why a deferral of the taking should nullify any compensation obligation that might otherwise exist. Certainly, respondent's unadorned assertion that "[t]he concept of amortization cannot be questioned" (Opp. 16) does not constitute a satisfactory answer to the arguments advanced in the Petition.

Indeed, respondent's Brief in Opposition is remarkable for its failure to come to grips with the constitutional

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[1] Respondent does not dispute that the extent of the impairment of property interests resulting from its ordinance is concretely and finally determinable at this time, so that the controversy is ripe for resolution by this Court. See Pet. 6-7 n.3.

objections to amortization as a substitute for compensation. To the extent the amortization concept is defended (rather than just described), it is simply to assert (Opp. 8) that "[a] 'taking' and a valid exercise of the police power are mutually exclusive concepts absent a physical invasion of the property * * *." This argument (addressed and refuted at Pet. 19) has extraordinary consequences: *Berman* v. *Parker*, 348 U.S. 26 (1954), held that a city wishing to improve the beauty of its environment could take private property for that purpose, provided just compensation were paid; but if the proposition on which Raleigh rests its argument is correct, a city could accomplish precisely the same thing at no cost to itself simply by declaring the property in question to be "nonconforming" and ordering the owners to remove it, without compensation, after a short "amortization" period. The Brief in Opposition offers no explanation for this incongruous result. Surely, the validity of respondent's dubious contention is a matter of substantial constitutional significance, and Raleigh's dependence upon it simply enhances the importance of and need for review by this Court.[2]

The Brief in Opposition also fails to mention, much less discuss, such cases as *Pennsylvania Coal*, *Penn Central*, or *San Diego Gas & Electric*, which frame the constitutional issue presented here. The sole citation to any discussion of regulatory takings in opinions of this Court is a paraphrase (Opp. 9) of an uncontroversial but essentially immaterial observation in *Agins* that the government is not a guarantor of private profits or property values. In fact, *Agins* contradicts respondent's proposition that a valid exercise of the police power cannot amount to

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[2] The concept that regulatory takings occur only when the regulation in question violates due process is the basis of arguments made to the Court in the pending regulatory takings cases. *See, e.g.*, National Conference of State Legislatures Am. Br. in *Keystone* (No. 85-1092), at 7-16.

a taking, since the question there was whether municipal zoning ordinances that were indisputably valid nevertheless took the appellants' property without just compensation. See 447 U.S. at 257.

2. Those arguments that respondent actually does advance in opposition to the Petition are seriously flawed because they rest upon three fundamental misconceptions: first, that Naegle's case depends on an allegation that the 1983 Ordinance takes its entire outdoor advertising business in the Raleigh-Durham area, rather than specific property interests; second, that the ordinance has little actual impact upon Naegele's business in Raleigh; and finally, that the case challenges the reasonableness of the particular amortization scheme Raleigh has adopted rather than the constitutionality of the amortization concept. We briefly address these points.

a. A central theme of respondent's argument is that the Constitution does not guarantee the right to use property to engage in a particular business (Opp. 8) and that Raleigh's ordinance "does not destroy Naegele's business." Opp. 3. Respondent attempts to sustain the result reached by the court of appeals by suggesting (Opp. 11) that Naegele will be able to maintain its signs alongside federally protected roads, that it owns structures outside Raleigh that are not affected by the ordinance, that it may erect new, conforming signs in districts zoned for industrial uses, and that it may continue to operate that part of its business not involving off-premise signs.[3]

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[3] The last opportunity may be short-lived. The Brief in Opposition suggests (at 2 n.1) that Raleigh now contemplates requiring removal of large numbers of on-premise signs. This proposed action would substantially increase the business injury caused by the city's sign regulations (see North Carolina Restaurant Association Am. Br. 4-5) and makes it all the more important that this Court review the holding of the court of appeals in the instant case.

Putting to one side for the moment the correctness of these factual assertions, this line of argument entirely misses the point that distinguishes this case from ones involving only lost opportunities for economic development. The essence of the takings claim here relates not to the limitations imposed by the ordinance upon the erection of new signs, nor to any inability of Naegele to maintain its business nationwide, in the State of North Carolina, in the Raleigh-Durham area, or even in Raleigh itself. Rather, the heart of Naegele's claim is that the regulation will bring about the effective destruction of 174 existing, income-producing signs that plainly constitute private property and that Raleigh itself acknowledges (Opp. 9-10) are of substantial value.[4] Even if Naegele could erect 174 new signs at other locations, that would have no bearing on whether the requirement to tear down existing lawfully erected structures constitutes a taking of those signs that must come down. See Pet. 18-19 n.12.

Respondent largely ignores the main loss of property—the signs themselves—caused by Raleigh's regulation. It does assert at one point (Opp. 11) that "it takes little imagination to realize" that Naegele's non-conforming signs can be relocated elsewhere in North Carolina. We are not aware that "imagination" had become a basis for granting summary judgment. The reality is that the signs, most of which are substantial structures with

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[4] The ordinance will also deprive Naegele of all economic value in property interests it possesses in many of the parcels where those signs are located. It is no answer to say, with respect to Naegele's leases, that some of them contain provisions allowing their termination if signs may not lawfully be maintained on the property (see Opp. 12 ¶ 6). If the leases have economic value to Naegele that is entirely extinguished as a result of the ordinance (a matter that would have to be determined at a trial), their loss would give rise to a compensable taking, and it is irrelevant that Naegele does not also incur the obligation to pay a penalty to the lessor.

deeep in-ground foundations (see Outdoor Advertising Association of America Am. Br. 7), will have only scrap value when taken down (C.A. App. 356) and therefore cannot simply be relocated elsewhere.

b. Even if it were relevant to the takings claim whether Naegele retains adequate opportunities to continue its billboard business at other locations in Raleigh, respondent substantially misdescribes the impact of its ordinance on those opportunities. It is a classic of understatement to say that "[t]he only difference between the new regulations and the old are that a fewer number of signs will be permitted and those will be smaller in size" (Opp. 3). While the small sizes permitted for off-premise signs under the ordinance may have utility in areas with heavy pedestrian traffic or slow-moving vehicular traffic, they are wholly impractical for the most common uses of outdoor advertising. See The Advertising Council Inc. Am. Br. 14 n.4. Equally important, because the ordinance limits the location of even the small off-premise signs it permits to only two of Raleigh's 22 zoning districts, and because the signs must be at least 400 feet from the boundaries of any zone allowing residential use (19 of the 22 zones) and at least 1000 feet from any other off-premise sign, there are in fact few and inadequate opportunities for Naegele to replace the existing signs when those are destroyed. In reality, the only business left to Naegele will be along those highways where federal and state law prevent Raleigh from ordering removal of signs without payment of just compensation; and the value of this rump business will be millions of dollars less than the value of the business that now exists.

c. The third misconception, which underlies the analysis of the court of appeals as well as the Brief in Opposition, is that the case turns upon the reasonableness of the particular "amortization" period permitted by Raleigh (and that Naegele's response to Raleigh's summary judgment motion was insufficient to create an issue of

fact on this subject). See Pet. App. 9a-10a; Opp. 5, 10, 16. The reasonableness of the Raleigh amortization period, however, is not the issue the Petition presents. The Petition asks this Court to determine not whether the 5½ year delay in the 1983 Ordinance is too short, but whether a compensable taking occurs when, at the end of whatever period of delay may be permitted, property retaining substantial value must be abandoned or destroyed as the result of governmental action.

In fact, the amortization concept makes no sense as a means of analyzing whether a zoning regulation works a compensable taking of private property. Certainly the suggestion (Opp. 9) that the doomed signs can be fully depreciated for tax purposes in five years cannot be relevant. If the government were to take fully depreciated property by eminent domain, it would nevertheless have to pay compensation equalling the property's actual market value. Respondent fails to explain why a taking by regulation should produce a different result.

Neither does the fact that Naegele's signs are capable of producing large amounts of income during the period they are allowed to remain in place (Opp. 9-10) justify the amortization concept. Indeed, this suggestion shows how substantially respondent misapprehends the relevant legal principles, for quite the opposite conclusion flows from the argument. The more income a sign produces, the more valuable it is and the greater is the loss suffered by its owner when it must be destroyed. The fact that the signs produce a substantial flow of income that would continue after the end of the amortization period simply proves the need to provide just compensation for their forced destruction.

Nor, finally, is respondent correct in asserting that the amortization concept is accepted almost universally as a permissible alternative to payment of compensation for

forced removal of structures made nonconforming by zoning changes.[5] The Petition cites (at 22-23), and respondent largely ignores, holdings of the Supreme Courts of Ohio, Missouri, Indiana, and New Hampshire, the latter two within the past five years, that amortization may not constitutionally displace just compensation in this context.[6] The contrary cases on which respondent relies (Opp. 7) carry little weight because they fail to engage in the appropriate analysis of the takings claim—perhaps due to the fact that for the most part they antedated the 1978 decision in *Penn Central*, which was the first of a series of recent opinions of this Court framing that analysis.[7]

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[5] Respondent's contention (Opp. 6 n.5) that the Highway Beautification Act, as originally enacted, "allowed the amortization of billboards" is mystifying. The Act from its inception has required the payment of just compensation for forced removal of signs along the federally aided highways to which it applies. See 23 U.S.C. § 131(g) (1965 ed.). The 1978 amendment to which respondent refers simply clarified what was in fact provided at the time the Act was first passed. See *Provision of Compensation by States for Removal of Billboards Under the Highway Beautification Act of 1965*, 42 Op. Att'y Gen. 331 (1966).

[6] Respondent erroneously asserts (Opp. 13) that most of the conflicting cases that the Petition describes were decided on independent state grounds. It specifically mentions only one case, from an intermediate Wisconsin appellate court, which was not in fact invoked by the Petition as a conflicting interpretation of the federal Constitution. Of the four decisions referred to in text, those from Ohio and Missouri explicitly rested on the Fourteenth Amendment. That from Indiana, while not expressly stating its basis, announced its holding in the language of the Fourteenth Amendment ("unconstitutional as the taking of property without due process of law") (see Pet. 23) rather than that of the state constitution (individual injured in property "shall have remedy by due course of law") (Indiana Const., Art. I, § 12). And the New Hampshire court, while indeed relying on state law, employed the same analysis as relevant decisions of this Court.

[7] Respondent also errs in suggesting (Opp. 13-14) that the Court should attach weight to the denials of review in *Joyner* and *Donrey Communications*. The *Donrey* petition presented solely a

3. We suggested in the Petition (at 24-28) that, as an alternative to granting review at this time, the Court should at least hold the Petition for appropriate disposition in light of its decisions in four pending cases involving regulatory takings. Respondent's purported distinctions of the pending cases, which rest on a peculiar reading of those cases combined with a fundamentally mistaken view of the issues in the instant case (discussed above at pages 4-8), warrant no response.

* * * * *

Respondent contends that, by asserting a right to compensation for forced removal or destruction of valuable property made nonconforming by the 1983 Ordinance, Naegele seeks to "frustrate changes and improvements" in zoning (Opp. 9) and that adoption of its legal position would "penalize the public" by denying the power to eliminate land uses that "changing [public] needs, mores and sentiments" supposedly no longer deem appropriate (Opp. 17). In fact, nothing in Naegele's position here prevents Raleigh from taking whatever action it deems best advised with respect to regulation of signage. Naegele asks only, as the Takings Clause intended in prohibiting uncompensated takings of private property, that it not be required "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly* v. *PBGC*, 106 S. Ct. 1018, 1027 (1986), quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

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statutory issue under the Highway Beautification Act, not a Takings Clause issue (see 52 U.S.L.W. 3784 (U.S. Apr. 24, 1984)), while *Joyner* involved leases entered into after the passage of the challenged ordinance, not any preexisting property interest (see 211 S.E. 2d at 326).

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FEBRUARY 1987